Supreme Court U.S.
FILED

07-383 SEP 19 2007

OFFICE OF THE CLERK

No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID H. and CATHERINE M. VOORHEES,
husband and wife,

Petitioners

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, EILEEN M. McLANE, FAIRFAX COUNTY ZONING ADMINISTRATOR, PJB LLC, PFK LLC and HALL HOLLIN LLC,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

David H. and Catherine M. Voorhees
8029 Washington Road
Alexandria, Virginia 22308
(703) 765-7551

Questions Presented

1. Whether a zoning ordinance confers a property right, which requires public notice and a public hearing, on adjacent property owners prior to allowing development that increases the current density of the zoned area beyond that allowed by the zoning classification.

2. Whether the burden of proof was properly assigned to Petitioners who wanted to maintain the existing character and use of the land (i.e., density) to disprove unsupported assertions made by Fairfax County staff stating that the neighborhood's density could be increased without notice or a public hearing.

3. Whether the due process clause of the 14th Amendment of the U.S. Constitution would be violated when a group of neighboring property owners are precluded from individually representing themselves *pro se* at a circuit court hearing of an appeal of a Board of Zoning Appeals' decision.

4. Whether it is a violation of the 14th Amendment due process clause for the Board of Zoning Appeals to limit the scope of an appeal of a Zoning Administrator's interpretation of a zoning regulation, which requires all other regulations of the zoning ordinance to be satisfied, by refusing to address Petitioners' appealed issues.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Concerned Citizens of Hollin Hall Village,

Mark and Nancy Welch, husband and wife,

Joan T. Coe,

Eugene A. Groshong,

Melvin and Robin Smith, husband and wife, and

James and Karen Stein, husband and wife.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS ..... iii, iv

TABLE OF AUTHORITIES ..... v, vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS 2

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT 11

I. Adjacent Property Owners have a constitutionally-protected property interest in maintaining the density of their zoning classification 13

II. Unfair Assignment of Burden of Proof. 23

III. *Pro Se* Petitioners Are Entitled To The Same Considerations As Those Represented By Counsel. 24

IV. Limiting The Scope Of Review To A Narrow Issue Framed By Fairfax County Staff And Ignoring Important

Issues Raised By Adjacent Property Owners Is A Violation Of Their Substantive Due Process Rights..... 27

Conclusion 30

INDEX TO APPENDICES

Appendix A – January 31, 2006 Transcript Of Board Of Zoning Appeals' Motion Upholding The Zoning Administrator's Decision.

Appendix B – Zoning Administrator's Determination.

Appendix C – Final Order from the Fairfax County Circuit Court Entered October 13, 2006 Denying Petitioners' Prayer for Relief in the Petition for Writ of Certiorari.

Appendix D – Decision of Supreme Court of Virginia Denying Review.

Appendix E – Decision of Virginia Supreme Court Denying Rehearing Petition.

Appendix F- Fairfax County Circuit Court Order Entered July 14, 2006 Requiring Petitioners To Be A *Pro Se* Party.

Appendix G – Fairfax County Circuit Court Order Entered October 6, 2006 Stating That Catherine M. Voorhees Will Continue In The Case As A *Pro Se* Petitioner.

Appendix H - Petitioners' Application for Appeal.

Appendix I – Hollin Hall Village Neighborhood.

Appendix J – Comprehensive Plan Excerpts

TABLE OF AUTHORITIES CITED

Cases **Page**

Creative Environment v. Estabrook
680 F.2d 822 (C.A.1 (Mass.) 1982) 27
Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309,
129 L. Ed.2d 304 (1994) 22
First Union Mortg. Corp. v. Frempong
744 A.2d 327 (Pa.Super. 1999) 25
Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983,
1994 L. Ed.2d 556 (1972) 9, 11
Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594,
30 L. Ed 2d 652 (1972) 25
Hall v. Planning Board, 2 Conn. App. 49, 52, 475 A.2d
1114 [cert. granted, 194 Conn. 805, 482 A.2d 710
(appeal dismissed March 5, 1985)] 12
Hoke v. Moyer
865 P.2d 624 (Wyo., 1993) 9, 12
Horn v. County of Ventura, 24 Cal.3d 605,
165 Cal Rpt. 718 (Cal. 1979) 9, 12
Love v. National Bank
205 Va. 860, 140 S.E.2d 650 (1965) 24
PFZ Properties, Inc. v. Rodriguiez
928 F.2d 28, 31 (1st Cir. 1991) 12
South Hollywood Hills Citizens Ass'n v. King County
677 P.2d 114, 101 Wn 2d 68 (1994) 12
Triffen v. Janssen
426 Pa.Super. 57, 626 A.2d 571, 573 (1993) 25
Village of Euclid, Ohio v. Ambler Realty Co., 272
U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926) 11

Constitutional Provision

XIV Amendment 9, 27, 30

Statutes

Va. Code §15.2-2314 ..... 19, 27
Va. Code §15.2-2307 10
Va. Code §15.2-2284 10
Va. Code §15.2-2261 10

Ordinances

1978 Fairfax County Zoning Ordinance Regulations
Article 1, Part 2 (Section 1-200) 17
Article 2, Section 2-405 ..... 11, 19, 21, 29
Article 2, Section 2-601 29
Article 2, Section 2-602 29
Article 3, Section 301 11
Article 3, Section 308 11
Article 17, Section 104 29

Fairfax County Comprehensive Plan 17, 18, 19

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

Opinions Below

This petition seeks review of a Fairfax County, Virginia Circuit Court Final Order that affirmed the decision of the Board of Zoning Appeals (BZA) and denied Petitioners' prayer for relief. A timely appeal was filed at the Supreme Court of Virginia. The Supreme Court refused to hear the Petition For Appeal on May 8, 2007. A Petition for Rehearing was timely filed by Petitioners. However, the prayer of the petition was denied on June 22, 2007. This petition is filed within 90 days of that date as provided under Rule 13.

No opinion was rendered by either of the lower courts. Thus, no decision has been reported. The transcript of the BZA's Motion upholding the Zoning Administrator's determination is reprinted at Appendix A. The Zoning Administrator's determination appears at Appendix B. The Final Order of the Fairfax County Circuit Court is reprinted in Appendix C. The Supreme Court of Virginia denials are reprinted at Appendix D and Appendix E.

Jurisdiction

The date on which the highest state court decided our case was May 8, 2007. A timely Petition for Appeal was filed at the Supreme Court of Virginia, which was refused, and a timely petition for rehearing was denied on June 22, 2007, as shown in Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional Provisions, Statutes, Ordinances And Regulations Involved In The Case

XIV Amendment of the U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia Statutes:

§ 15.2-2261 - Recorded plats or final site plans to be valid for not less than five years.

...

C. For so long as the final site plan remains valid in accordance with the provisions of this section, or in the case of a recorded plat for five years after approval, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely

affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the recorded plat or site plan unless the change or amendment is required to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare.

...

E. The provisions of this section shall be applicable to all recorded plats and final site plans valid on or after January 1, 1992. Nothing contained in this section shall be construed to affect (i) any litigation concerning the validity of a site plan pending prior to January 1, 1992, or any such litigation nonsuited and thereafter refiled; (ii) the authority of a governing body to impose valid conditions upon approval of any special use permit, conditional use permit or special exception; (iii) the application to individual lots on recorded plats or parcels of land subject to final site plans, to the greatest extent possible, of the provisions of any local ordinance adopted pursuant to the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.); or (iv) the application to individual lots on recorded plats or parcels of land subject to final site plans of the provisions of any local ordinance adopted to comply with the requirements of the federal Clean Water Act, Section 402 (p.) of the Stormwater Program and regulations promulgated thereunder by the Environmental Protection Agency. (Code 1950, §§ 15-789, 15-967.10; 1952, c. 333; 1962, c. 407, § 15.1-475; 1964, c. 498; 1975, c. 641; 1977, c. 10; 1978, c. 283; 1979, c. 111; 1980, c. 73; 1986, c. 483; 1989, cc. 471, 495; 1990, c. 171; 1992, c. 843; 1993, c. 846; 1996, c. 353; 1997, c. 587.)

§ 15.2-2284 - Matters to be considered in drawing and applying zoning ordinances and districts.

Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability

of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality. (Code 1950, §§ 15-821, 15-968.4; 1962, c. 407, § 15.1-490; 1966, c. 344; 1974, c. 526; 1978, c. 279; 1981, c. 418; 1983, c. 530; 1989, cc. 447, 449; 1997, c. 587.)

§15.2-2307 - Vested rights not impaired; nonconforming uses.

Nothing in this article shall be construed to authorize the impairment of any vested right. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

§15.2-2314 - Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the

county or city a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the realtor's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

In the case of an appeal from the board of zoning appeals to the circuit court of an order, requirement, decision or determination of a zoning administrator or other administrative officer in the administration or enforcement of any ordinance or provision of state law, or any modification of zoning requirements pursuant to § 15.2-2286, the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party

may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo. ...

(Code 1950, §§ 15-834 through 15-839, 15-850, 15-958.11; 1950, p. 176; 1962, c. 407, § 15.1-497; 1975, c. 641; 1988, c. 856; 1994, c. 705; 1996, c. 450; 1997, c. 587; 2001, c. 422; 2003, c. 568; 2005, cc. 625, 677; 2006, c. 446.)

Fairfax County Zoning Ordinance Regulations

1-200 PURPOSE AND INTENT

The Zoning Ordinance of Fairfax County, Virginia, is intended to promote the health, safety and general welfare of the public and to implement the adopted comprehensive plan for the orderly and controlled development of the County.

2-405 Permitted Reduction in Lot Size Requirements for Certain Existing Lots

1. If a lot was recorded prior to March 1, 1941, or if a lot was recorded prior to the effective date of this Ordinance, and said lot met the requirements of the Zoning Ordinance in effect at the time of recordation, then such lot, either as a single lot or in combination with other such lots pursuant to a Building Permit, may be used for any use permitted in the zoning district in which located under this Ordinance even though the lot(s) does not meet the minimum district size, lot area, lot width and/or shape factor requirements of the district, provided all other regulations of this Ordinance can be satisfied.

This provision shall not apply to any such lot which, subsequent to the effective date of this Ordinance, is rezoned at the request of the owner or his agent or is subdivided by the owner or his agent, except for:

A. A subdivision resulting from a voluntary dedication by the owner or a condemnation or acquisition of a portion thereof for public purposes by any governmental agency; or

B. A subdivision for a minor adjustment of lot lines, which may be permitted by the Director in accordance with Chapter 101 of The Code and the following:

(1) Such subdivision shall only be to consolidate land area of contiguous lots, or to rearrange lot lines in order to reallocate land area between contiguous lots such that the reconfigured lots contain either the same lot area as existed prior to the adjustment of the lot lines or a greater area than existed prior to the adjustment of the lot lines which results in a reduced number of lots; and

(2) There shall be no additional lots or outlots created, no increase in the maximum density and the resultant lot lines shall not create any new or aggravate any existing noncompliance with regard to minimum lot area, lot width, shape factor or minimum yard requirements.

2-601 Limitation on the Removal and Addition of Soil

No soil shall be removed from or added to any lot in any zoning district except in accordance with one of the following provisions:

...

3. Grading of land shall be permitted in accordance with a grading plan approved by the Director. The Director shall determine that the amount of soil removal or fill and proposed grading is necessary for the establishment of a use permitted in the zoning district in which located, and that the grading plan shall provide for even finished grades which meet adjacent properties' grades and do not substantially alter natural drainage,

2-602 Drainage, Floodplains, Wetlands and Resource Protection Areas

1. Notwithstanding the provisions of Sect. 601 above, no building shall be erected on any land and no change shall be made in the existing contours of any land, including any change in the course, width or elevation of any natural or other drainage channel, in any manner that will obstruct, interfere with, or change the drainage of such land, taking into account land development that may take place in the vicinity under the provisions of this Ordinance, without providing adequate drainage in connection therewith as determined by the Director in accordance with the provisions of the Public Facilities Manual.

3-301 Purpose and Intent

The R-3 District is established to provide for single family detached dwellings at densities set forth in Sect. 308 below; to provide for affordable dwelling unit developments; to allow other selected uses which are compatible with the low density residential character of the district; and otherwise to implement the stated purpose and intent of this Ordinance.

3-308 Maximum Density

1. Conventional subdivisions: Three (3) dwelling units per acre.

17-104 Uses Exempt from a Site Plan or a Minor Site Plan

Unless otherwise required by proffered conditions or development conditions of an approved rezoning, special permit, special exception or variance, the following uses shall not be subject to the requirement for a site plan or a minor site plan. Such uses, however, shall still be subject to all other applicable provisions of this Ordinance, the Public Facilities Manual and The Code.

1. Single family detached dwellings and their related accessory uses and structures.

Statement of the Case

From the very beginning of this appeal of the Zoning Administrator's decision to allow two houses to be constructed on a single recorded and taxed lot in the Hollin Hall Village subdivision[1], unreasonable hurdles have been placed before individual neighboring property owners which have impeded their right to clearly and effectively present their complaint for redress. First, many important issues raised by petitioners in the BZA appeal were never addressed. Then, the BZA improperly placed the burden of disproving unsupported assertions made by Fairfax County staff, which were necessary for the BZA's decision upholding the doubling of the density of a current zoned area. Under Section 1, Amendment XIV of the U.S. Constitution, petitioning neighboring property owners are entitled to due process of law before being deprived of their property rights.[2]

Similar to *Hoke v. Moyer*, the County denied that they are changing the zoning ordinance. The end result being that petitioners' due process rights were cast aside as their assertions of Virginia Code Statutes and other County regulations were not considered by the BZA. Under §15.2-2314 of the Virginia Code, petitioners were entitled to a review of the BZA decision. In a July 2006 Order from Circuit Court the individual petitioners were mandated to proceed *pro se*. However, at the October 2006 hearing, the Circuit Court could not see how a group of *pro se* individuals could proceed at the hearing. Thus, the Circuit Court denied those individual petitioners the opportunity to speak and present their case at the hearing. Neither the

---

[1] See Appendix I.

[2] Zoning regulations cannot be changed without notice to all affected property owners. *Hoke v. Moyer*, 865 P.2d 624 (Wyo., 1993), *Horn v. County of Ventura*, 24 Cal.3d 605, 165 Cal Rpt. 718 (Cal. 1979), *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 92 S.Ct. 1983, 1994, L.Ed.2d 556 (1972).

Circuit Court nor the Supreme Court of Virginia wrote opinions so those courts did not address the issues raised by petitioners that the BZA expressly excluded from their review. This case is significant because as areas reach maximum build out, local county governments may opt to assert that there is no change to the zoning classification in order to permit higher density thereby denying the necessary due process afforded by public notice and a public hearing.

In that Fairfax County staff has stated that there are more areas with two side-by-side lots with a house built over the adjoining lot lines, a mixed message is being sent to County staff that adjacent individual property owners do not have a property right unless the County decides that they do. Thus, while petitioners may have been granted procedural process, the denial of substantive due process prevented any "meaningful" review or reconsideration of the Zoning Administrator's determination. This unconstitutional denial of due process should be stopped.

In particular, the Virginia Code specifies that zoning districts shall be established based on the way the land was developed among other criteria.[3] The Code of Virginia only provides that a recorded subdivision plat is immune from zoning amendment regulations for a period of five years, unless diligent pursuit of the recorded subdivision is in process.[4]

Hollin Hall Village was zoned after it was completely developed so that one house being torn down should only be replaced with one house in order to conform with the Zoning Ordinance. That is, the one house that is being torn down conforms with the Zoning Ordinance, while the two new homes being built in its place do not. The County staff report recognized that the purpose and intent of the R-3 residential district ("to provide single family detached

---

[3] Va. Code §15.2-2284.

[4] Va. Code §15.2-2261 and §15.2-2307.

dwelling units at a density not to exceed three (3) dwelling units per acre"[5]) cannot be achieved if two new homes replaced an existing home. (BZA R at 123.)[6] But, it was their opinion that this regulation conflicted with zoning regulation 2-405. The BZA upheld the Zoning Administrator's determination and did not address the Virginia Code statutes and Zoning regulations raised by petitioners that could not be satisfied in favor of confining its review to the narrow issue raised by Fairfax County staff.

Reasons for Granting the Writ

This Court has stated: "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes* v. *Shevin* at 80-81. However, under current law of the BZA, the local governing body may decide that the property interest of the adjacent property owner is not as great as another property owner who is increasing the current density of the zoned area.

The Court should grant review in this case in order to reinforce the property rights of adjacent property owners and to resolve a conflict among the state courts concerning the due process rights of an adjacent property owner. In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926), this Court supported zoning ordinances that were enacted to restrict development so that the character of the neighborhood and the desirability as a place to live are not destroyed. The State of Wyoming has upheld the rights of an adjacent property owner when the government tried to increase the density of neighboring

---

[5] Article 3, §§ 301 and 308 of the Fairfax County Zoning Ordinance.

[6] References to the Board of Zoning Appeal Record will be cited herein at ("BZA R at ___.").

property.[7] The State of California in *Horn* v. *County of Ventura* held that a tentative approval of a subdivision plat constitutes a substantial or significant deprivation of property rights of other landowners thereby triggering notice and an opportunity to be heard. But, the State of Washington permitted the government to use a technicality to deny a newly formed organization of adjacent property owners judicial review of a governmental action which substantially effected their property rights.[8] The position of the First Circuit is that substantive due process guarantees fundamentally just and fair government action.[9]

The lower courts will continue to be plagued with uncertainty when to grant adjacent property owners substantive judicial review. The Commonwealth of Virginia, along with other states, does not have a written opinion on this issue with respect to the increase in density of a neighborhood. Other courts have held that common sense must be used in interpreting a zoning regulation.[10] Fairfax County simply states that there is no rezoning or a subdivision occurring to continually deny adjacent property owners their substantive due process rights throughout the judicial review. Consequently, without intervention from this Court, lower courts may continue to deprive adjacent property owners notice and due process thereby denying such aggrieved persons equal protection under the laws to protect their property interest in maintaining the density of their zoned neighborhood.

---

[7] *Hoke* v. *Moyer* (Wyo. 1993).

[8] *South Hollywood Hills Citizens Ass'n v. King County*, 677 P.2d 114, 101 Wn 2d 68 (1994).

[9] *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991).

[10] *Hall v. Planning Board*, 2 Conn. App. 49, 52, 475 A.2d 1114 [cert. granted, 194 Conn. 805, 482 A.2d 710 (1984) (appeal dismissed March 5, 1985)]

I. Adjacent Property Owners Have A Constitutionally-Protected Property Interest In Maintaining The Density Of Their Zoning Classification.

At the Board of Zoning Appeals hearing on January 31, 2006, no less than six individual petitioners raised the issue of adjacent property owners rights to maintain the zoned density. However, the BZA did not address the adjacent property owners property rights in favor of deferring to the rights of only the property owner to increase the density of the neighborhood.

Mrs. Walzl testified:

> Good afternoon, Mr. Chairman, members of the board. My name is Gretchen Walzl. I reside at 7917 New Market Road, Alexandria, Virginia in the subdivision of Hollin Hall Village. I speak today on behalf of the Concerned Citizens of Hollin Hall Village. My topic, homeowner versus developer in inequality of the county. The guidelines are clear when it comes to what the homeowner may or may not do pertaining to changes on his property. With respect to building permits or variances, Fairfax County has written directives on procedures to get the job done. The material presented must be current. These include plats, structures, soil samples, and current photos of property. No previous documentation will be accepted. Additionally, all surrounding properties must be notified in writing by register- --registered return mail determined by Fair- -- properties determined by Fairfax County. Unfortunately, these same directives are

not applied to developers who seem to move at will through the system with whatever will make their end result occur, mainly new buildings. Old unapproved plats and structures and old ordinances have been part of this appeal since the beginning. An example being Attachment 9 from the Fairfax County Staff Report dated January 24, 2006, whereby tax map number 102-2-03-0115 so referenced does not exist in the Fairfax County tax records. Additionally, there was failure to recognize the importance of best practices management of storm water in this sector. Fairfax County's disregard and unfamiliarity with its own laws and the Virginia Code regarding zoning is at the crux of this matter. It is quite simple, equal directives for both homeowner and developer trying to obtain permits on properties should be the same. The construction application request to build an increased density by the developer, thus creating a de facto R-5 in Hollin Hall Village without a public hearing is unconscionable. This was not merely a request to build a new home, but a major request to change the dynamics of the neighborhood. At minimal, a public hearing should have been set. Our concerns are very real, as we purchased our property with the understanding that the current zoning regulation R-3 apply. The homeowners in this neighborhood purchased their homes because of the trees, low density, and open space for our

children to play in. If we wanted a higher density neighborhood, we would have purchased a home elsewhere. We request Fairfax County protect our property rights, as the rights to redevelop this land expired a long time ago.
(BZA R. at 478.)

Mr. James Stein testified:

Good afternoon. My name is James Stein. I live at 8039 Fairfax Road in Alexandria, Virginia, 22308. We are strongly opposed to subdividing the lots and building two houses where one previously stood. I will briefly address my first concern that was outlined in the letter to the Board of Zoning Appeals, and that is flooding. We have lived in this neighborhood for 18 years. We are on the corner of Fairfax Road and Lafayette Drive in the lowest point in the neighborhood. Much of the storm water from our block drains past our yard. All of the storm water in the 160 acres of adjacent watershed passes within 100 feet of my property. There are potentially nine new homes that will increase the watershed directly to the easement along my property. In a heavy rain storm about one inch per hour, each house will generate 125 cubic feet of storm water per hour. That's an additional 1,125 cubic feet passing my property per hour, and more likely, 2,250 cubic feet since Public Works waived best practices for storm water management. Since the storm water management system can not handle

the existing flow in heavy rain, this new water will pile up and flood my property. It is bad now, and it will be a disaster if the subdividing is allowed. Add in the potential of 100s of large lots in our subdivision and the others that feed the watershed across from Fort Hunt Road, and we are talking about feet of water that might be arising in adjacent yards. The two adjacent streams have relatively narrow channels, and with no real flood plain to expand into. If the adjacent 160 acres of watershed are similarly overdeveloped, that one inch per hour rain will result in a minimum of 60,000 cubic feet to 120,000 cubic feet of water passing through channels that are only about 20 feet wide. The 20 feet wide channel is already at capacity or over capacity in a heavy rain. And further, due to the watershed construction downstream, such as Collingwood Road culverts near Karl Road, water will back up, and this new water will pile up on top adding feet of depth to the floods.

If this subdividing is permitted, many tens of millions of dollars of storm water management work would be needed to be done just to keep the storm water issue where it is today, which is already insufficient and unacceptable. Since the water channels are part of the Chesapeake water shed and are designated resource protection areas, you can not simply clear cut and deepen and widen them. Therefore, you can not permit this increase in housing

density to occur, since you can not manage the storm water it will create.
(BZA R. 481.)

Mr. Mark Welsh testified:

Good afternoon. My name is Mark Welch and I live with my wife and three children at 8036 Washington Road. Five of the six adjacent properties to mine have been bought by developers. The Zoning Administrator's determination would allow 10 houses to be shoehorned in place where those five houses currently stand. I don't know if you all live in residential neighborhoods similar to ours, but if you do, I would ask you to imagine for a moment what your immediate neighborhood would look like if five our your adjacent properties were replaced with 10 in the same footprint. It's not a pretty picture, and that's the picture we're looking at if the Zoning Administrator's determination is allowed to stand.

I'm going to focus my remarks on how the administrator's determination is contrary to the Zoning Ordinance as it relates to the Fairfax County comprehensive plan on land use. Now, the stated purpose and intent of the Zoning Ordinance, and here I'm quoting from Part 2, Article 1, "is to promote the health, safety, and general welfare of the public and to implement the adopted comprehensive plan," and I'll repeat, "to implement the adopted the comprehensive plan for the orderly and controlled development of the county."

If you'll bear with me for one minute, I'm going to quote several verbatim excerpts from the comprehensive plan[11], and I think that'll clearly demonstrate how the results of the administrator's determination would be inconsistent with that plan.

On page 1, "The pressure to redevelop existing lower density neighborhoods must be carefully controlled so as to not undermine stable neighborhoods. The loss of neighborhoods can quickly lead to a loss of a sense of community, a basic facet of a high quality of life."

On page 2, "The county's land use policies should maintain an attractive pleasant quality of life for its residents. Densities in excess of those compatible with these goals should be discouraged."

On page 10, "The county should encourage infill development in established areas that is compatible with existing land use that is at a comparable scale with the surrounding area, and that can be supported by adequate public facilities and transportation systems."

Allowing the construction of new houses that violate the existing minimum lot size for our R-3 zone neighborhood will adversely impact the quality of our lives, as this increased congestion will serve to "undermine our stable neighborhood," and allow for "densities incompatible with existing neighborhood". Thus, the comprehensive plan will not be

---

[11] See Appendix J.

implemented, as required by Section 2-405, which requires that all regulations otherwise be satisfied.

In closing, we've been communicating with county officials on this issue since the summer. One of the first terms I've heard them express was building by right. What I find ironic is that in the past six months, we've yet to hear a similar county term or catchphrase relating to our rights as Fairfax County taxpayers and citizens to live in an established neighborhood without being effectively rezoned by doubling its density. (BZA R. at 482-483.)

Mr. Melvin Smith testified:

My name is Melvin Smith. My wife Robin and I have lived at 8048 Fairfax Road in Hollin Hall Village since 1987. We're opposed to the plan of rezoning in infill development because it will severely -- we feel it will severely impact the character of our neighborhood and alter our quality of life. ...

Initially, only four properties were involved. This number, again based on information from the Fairfax County website is now -- has now gone up with developers and real estate agents in sort of like a feeding frenzy going around making offers to any house that sits on one of these "double lots." Should this rezoning go forward, approximately -- and this is just with the current offers, approximately one-third of the houses in our neighborhood on Fairfax Road and Washington Roads will

be new at densities far greater than those permitted by R-3 zoning, and there's no end in sight. The proposed infill, as Mr. Stein mentioned, will also greatly exacerbate an already problematic drainage situation. Our lot backs onto one of the tributaries of Little Hunting Creek. We have experienced flooding many times over the last few years where water has come into the yard. As Mr. Stein says, these extra houses increases in impervious surface, will only cause runoff to get worse, causing an already bad situation to just get even worse. (BZA R at 483-484.)

Mr. Eugene Groshong testified:

My name is Eugene Groshong. I live at 8060 Fairfax Road, directly across the street from 8059. My deed indicated that my house was built on one-and-a-half of these supposed original lots. I get one tax bill. It shows one piece of property. I went yesterday and looked on the website, there are no dotted lines on the tax appraiser's websites, they're not there. ... And I contend that the mere fact that they built on one-and-a-half lots, they built houses straddling two lots, they ignored the previous subdivision, and in totally ignoring it, they abandoned it, they gave it up. They have no -- they retain no rights whatsoever under that previous subdivision when they totally abandoned it, and just totally ignored it. I don't see how you can come along now and say, well, okay, now

you can do what was allowed 50 years ago when that was totally ignored at the time.

... As far as any inherent right to do what they want with their property, I can't tear down my house and rebuild it. My house is within 100 feet of a creek, the Chesapeake Bay Protection Act won't allow me to do that. So, to say that you can't take away somebody's right to build what they want on their property, that's -- that's just simply not so. (BZA R. at 487.)

Mrs. Catherine Voorhees testified:

[U]nder the Code of Virginia, all zoning regulations shall be uniform for the R-3 District. The regulation 2-405 is an exception. It only allows you to use one of those regulations. What you see in the proposed redevelopment is an R-5 development in an R-3 District. That is wrong.

What also is very clear is that those lot lines that you guys believe are etched in stone no longer exist. You have to have diligent pursuit to keep the vested right of that subdivision lot. And if you want to talk about the fact that there is the subdivision ordinance and consolidation, my house is an adjacent house to the property. It was built in 1948, as most of these were built in 1947, 1948, and 1949, before 1950. As you are well aware, all of these laws in the subdivision ordinance are prospective, they're not retroactive. You can not force us to use the subdivision ordinance after our houses were built. To

> say that, gee, back then, they weren't consolidated, we need to reconsolidate them again. Like I said, we are zoned R-3, and all of the regulations for R-3 should apply. (BZA R. at 491.)

With respect to land-use matters, this Court has held that the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct.2309, 129 L. Ed.2d 304 (1994). Adjacent property owners are being required to give up their constitutional right to substantive due process without receiving a benefit from the government when the adjacent property is increased in density. That is, the government should not be conferring a right unto one property owner that would destroy the fabric of the community and the rights of others in the neighborhood as described by petitioners' BZA testimony.

In Hollin Hall Village, the property rights that the BZA was concerned with were those of the developer who purchased a single home on a piece of land. If the County held that only one house could be built where one house stood, as petitioners argued at the BZA hearing, the property owner would not have lost anything because he purchased a single parcel of land with one house on it. The effect of the BZA decision is that the adjacent property owners lose their property interest when the neighborhood is redeveloped at twice the density. Since the purpose and intent of County Zoning Ordinance R-3 residential district cannot be met, an arbitrary and capricious decision was rendered that supports doubling the density when such is not within the scope and purpose of the zoning ordinance.

Despite the testimony recited above and the paraphrasing of these claims in the Petition for Writ of

Certiorari, the Circuit Court repeatedly questioned petitioners' standing and whether they had individual claims. (See Circuit Court Transcript page 8, lines 4-6, page 22, line15-24, page 27, line 23-page 29, line 12, page 34, line 20-page 35, line 12). Clearly, the Circuit Court was unaware of the record below that it was charged to review. The Circuit Court further held that the individual *pro se* petitioners could not represent themselves at the hearing when the Fairfax County attorney asserted that Mr. Voorhees has to speak for the group as counsel. Instead of asking Mr. Voorhees if he wanted time to consult with his clients, the Court replied that it did not "mean to railroad [Mr. Voorhees] into this." (Page 35, line 5 – Page 36, line 8 of the Circuit Court Transcript.) It was clear to the individual petitioners that they had no choice but to proceed as the Court directed at the hearing or else, they would get no hearing at all. Consequently, the individual property owners were denied their constitutionally-protected right to substantive due process.

The above claims by individual adjacent property owners were preserved by the objections appended to the Circuit Order Final Order. (Appendix C) In particular, objection 6. states "Under the current Subdivision Ordinance, the Zoning Administrator's decision is not a by-right subdivision. It is a resubdivision of a parcel creating a new lot which requires public notice and public hearing." Both the Petition For Appeal and Petition for Rehearing filed at the Virginia Supreme Court re-emphasized the objections appended to the Final Order.

II. Unfair Assignment of Burden of Proof

The burden of proving the factual questions of:
1) Whether the 1943 plat met the legal requirements for recordation; 2) Whether the 1943 plat met the zoning requirements at the time of recordation; and 3) Whether the

1943 plat was superseded by the 1946 plat and therefore subject to the minimum lot size requirements of 1946 (7200 square feet) were improperly placed on petitioners. Objection 1 appended to the Final Order (Appendix C) and Assignment of Error numbers 1 and 5 in the Petition for Appeal raised the issue of whether the standard of review was correct. It is manifestly unfair that this burden has been placed on petitioners after a 60 year lapse of time when Fairfax County is and was the keeper of Zoning Ordinance records. This burden should have been placed on Fairfax County staff who wanted to change the existing character and use of the land, not the adjacent homeowners of individual taxed lots who will be left to deal with the mixed use development sought by Fairfax County. The rights of the Hollin Hall Village community should be respected and not trampled upon by those who have no interest in the welfare of those citizens who make their home in the community.

It was improper for the BZA to require adjacent property owners to disprove the County staff's claim when the means by which the claim could have been disproved was lost with the lapse of time. *Love v. National Bank*, 205 Va. 860, 140 S.E.2d 650 (1965). Since all who could have answered questions 1) to 3) in the 1940s are no longer available, Fairfax County government should not be allowed to hide behind facts lost with the lapse of time and force citizens to disprove their claim.[12] Accordingly, the burden of proof was improperly placed upon petitioners.

III. *Pro Se* Petitioners Are Entitled To The Same Considerations As Those Represented By Counsel.

While the BZA hearing allowed adjacent property owners to testify individually, the Fairfax County Circuit

---

[12] First Assignment of Error in Appellants' Petition for Appeal.

Court held the adjacent property owners to a different standard than those represented by Counsel.[13] Following the Order entered July 14, 2006 mandating that the individual property owners proceed *pro se* (Appendix F), all of the individual property owners entered their appearance when the Memorandum of Law in Support of the Petition of Certiorari was filed. Neither opposing side objected to the Memorandum of Law filed by the adjacent property owners.

However, at the hearing, when asked by the Circuit Court if there is any practical difference if Mr. Voorhees represents himself *pro se* and Mrs. Voorhees represents herself *pro se*, counsel for Respondents PFK, LLC; PJB, LLC; and Hall Hollin LLC replied: "I understand that if somebody is represented by an attorney, that may have one effect. If they're not, then that has another effect." Most, if not all jurisdictions in the United States, allow individuals to represent themselves. The Commonwealth of Pennsylvania grants *pro se* litigants the same rights, privileges and considerations as those litigants represented by an attorney.[14]

Mr. and Mrs. Voorhees made it clear at the hearing that they were not official counsel and that they were representing themselves *pro se* as individuals.

THE COURT: So you're not representing them as lawyers?

MR. VOORHEES: No, not as their official counsel. We've not been retained as counsel by them. We're prosecuting this case on our own behalf. And if they – There are certain petitioners that may want to add remarks or something to this case. (See page 7, line 6 – page 8, line 3 of the Circuit Court transcript.)

---

[13] Unlike the less stringent standard which a *pro se* litigant was held to in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L. Ed 2d 652 (1972), the Circuit Court stated individual claims rather than global claims had to be litigated by each *pro se* litigant.

[14] *First Union Mortg. Corp. v. Frempong*, 744 A.2d 327 (Pa.Super. 1999) citing *Triffen v. Janssen*, 426 Pa.Super. 57, 626 A.2d 571, 573 (1993).

But, the Fairfax County attorney representing the Zoning Administrator objected to the Voorhees speaking for the other *pro se* petitioners immediately after the Voorhees had clarified that they were not speaking for the other petitioners. (See page 8, lines 13-23). At the very least, the Zoning Administrator's counsel confused the simple issue, which was that each of the *pro se* petitioners would have to represent themselves as already clarified to the Circuit Court. To which the Court responded: "I don't see how multiple parties can present a case as multiple parties."[15] (Page 13, lines 10-13 of the Circuit Court Transcript.)

This created a chilling effect on the individual petitioners that were present because if Mr. Voorhees did not agree to be counsel for the entire group, none of the attending individual petitioners would have an opportunity to be heard.[16] Prior to being appointed counsel for the entire group, Mr. Voorhees tried to get each individual petitioner an opportunity to be heard. But, the Fairfax County attorney persuaded the Court as follows:

MR. VOORHEES: But, we're all individual petitioners, as well.

THE COURT: Well, I'not going to - - I suppose –

Mr. Wynn?

MR. WYNN: Well, I was just going to say that he is now saying that he's going to represent everybody. But now he also wants everybody to represent themselves. I think that they have to be consistent. Whether you're going to be the attorney for these people and speak for all of them, or they all have to speak for themselves. (Page 34, lines 6-17 of the Circuit Court Transcript.)

With respect to Ms. Voorhees, the Fairfax County attorney specifically objected to her participation.

---

[15] Yet, the Circuit Court allowed both parties on Respondents side to argue individually at the hearing.

[16] Mr. Voorhees was an individual petitioner.

MR. VOORHEES: But she's a petitioner. Can't she present evidence?[17]

THE COURT: No.

MR. WYNN: I would object, Your Honor, to her participating in the case. (Page 33, line 20 – page 34, line 1 of the Circuit Court Transcript.)

The Fairfax County attorney's objection to Mrs. Voorhees participation obstructed an individual petitioners' due process right, as well as substantive due process of the entire group.[18] Is this fair play by government? Is the participation of the Fairfax County attorney office along with the rewritten nature of appeal drafted by Fairfax County staff, legitimate governmental action? Or, is this, as the 1st Circuit stated in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (C.A.1 (Mass.), 1982): "gross abuse of power, invidious discrimination, or fundamentally unfair procedures" when a government action should be reviewed.

Even when the entire group was represented by Mr. Voorhees, they were denied their due process as Mr. Voorhees was appointed to limit the number of petitioners (adjacent property owners) speaking at the hearing to one. As a result of the Fairfax County attorney's objection to Mrs. Voorhees participation, Mrs. Voorhees was denied the opportunity to present her case. Similarly, Mr. Groshong, Mr. and Mrs. Welch, Mrs. Stein and Mrs. Walzl were all denied due process under the 14th Amendment of the U.S. Constitution.

IV. Limiting The Scope Of Review To A Narrow Issue Framed By Fairfax County Staff And Ignoring

---

[17] Under Va. Code 15.2-2314, petitioners of a BZA appeal are allowed to present evidence.

[18] Ms. Voorhees was the *pro bono* counsel for the entire group, who prepared the Petition for Writ of Certiorari, and was involuntarily removed from this case the Friday before the Tuesday hearing with an Order stating she could continue to proceed *pro se*. See Appendix G.

Important Issues Raised By Adjacent Property Owners Is A Violation Of Their Substantive Due Process Rights.

The Concerned Citizens appealed the Zoning Administrator's decision (BZA R. at 030-033) to the Fairfax County Board of Zoning Appeals. (BZA R. at 008-0042.) The Concerned Citizens' appeal was based on a series of arguments identifying relevant county ordinances and Virginia Code which refuted the Zoning Administrator's decision. The Concerned Citizen's legal basis for the appeal of the Zoning Administrator's decision was set aside and redrafted by Fairfax County staff into a public notice stating: "...Appeal of a determination that lots, including the originally recorded underlying lot lines, met the zoning requirements at the time of their creation and are, therefore, buildable lots under Zoning Ordinance provisions."... (BZA R. at 082.)

The Concerned Citizens refuted the wording of the Legal Notice and restated the basis for the appeal and supplied additional exhibits in support thereof. (BZA R. at 289-336.) The Fairfax County restatement was the antithesis of the adjacent property owners appealed argument (See Appendix H.) as the recorded underlying lot lines do not exist. However, the Board of Zoning Appeals (BZA) maintained the narrow construction drafted by Fairfax County staff thereby limiting the scope of the Concerned Citizen's hearing. Board Member Hart stated at the January 31, 2006 hearing: "Yes, but, I mean my question to the validity of these lots. Whether there is a drainage problem in 2006 is not – **is not a BZA issue on January 31, 2006**." (emphasis added) (BZA R. at 477.)

Mr. Hart further stated:

> Thank you. Mr. Stein, let me address the stormwater issue. I don't mean to belittle it, and – I - it sounds from the material we

> read, it sounds like a there's a serious problem in the neighborhood whether or not new houses are built. Nevertheless, I think that the narrow question before us today deals with the validity of these lots and whether there's one lot or whatever that is. The stormwater drainage problem is not something we're reviewing."... (BZA R. at 482)

Thus, the BZA unfairly limited the appeal of the Zoning Administrator's interpretation of Regulation 2-405, which requires all other regulations of the Zoning Ordinance be satisfied, by refusing consideration of other requirements regulated by the Zoning Ordinance including stormwater.[19] The BZA's error was compounded by the Circuit Court as compliance of 2-405 with other Zoning Ordinance regulations was ignored and petitioners' right to have these issues considered was effectively excluded.

Furthermore, the Fairfax County staff report on the BZA appeal was not made available to the Concerned Citizens five days prior to the BZA hearing as required by the rule, but instead only after requesting the same, was an electronic copy of the report minus key exhibits provided less than 24 hours before the BZA hearing. Thus, the Concerned Citizens were not given the time provided by the rule, let alone adequate time to prepare a complete response (defense) to the County's position. (BZA R. at 470.)

---

[19] Article 17, Section 17-104 of the Fairfax County Zoning Ordinance states that the stormwater requirements of the Public Facilities Manual must be met. Article 2, Section 2-602 of the Zoning Ordinance requires "adequate drainage" of the land. Thus, the BZA should have considered stormwater issues on January 31, 2006, as argued in 30. G of the Petition for Writ of Certiorari before the Circuit Court. Fourth Assignment of Error in Appellants' Petition for Appeal.

Clearly, the lack of having the Fairfax County staff report to prepare for the BZA hearing and BZA's framing of the issue as determined by the Fairfax County staff created prejudiced petitioners right to be heard in order to protect their property rights under the due process clause of the 14th Amendment to the United States. Since the BZA did not look at all of the regulations of the Zoning Ordinance to see if they could be satisfied, without an opinion from either the Circuit Court or the Supreme Court of Virginia, no ruling was ever made on the issue that petitioners appealed: "Appeal of the Zoning Administrator's determination that an existing, conforming use can be redeveloped into a new non-conforming use."

Conclusion

For the reasons stated above, Petitioners, David H. and Catherine M. Voorhees, respectfully submit that this Court should grant their Petition for Writ of Certiorari in this action.

Respectfully Submitted,

Catherine M. Voorhees

and

David H. Voorhees

both of: 8029 Washington Road
Alexandria, VA 22308
703 765-7551

APPENDIX

APPENDIX A

COMMONWEALTH OF VIRGINIA
FAIRFAX COUNTY BOARD OF ZONING APPEALS
MOUNT VERNON DISTRICT

CONCERNED CITIZENS OF HOLLIN HALL VILLAGE
APPEAL APPLICATION A 2005-MV055

Fairfax, Virginia

Tuesday, January 31, 2006

MR. HART: Thank you. On application no. A-2005-MV-055 by Concerned Citizens of Hollin Hall Village, I move that the board make the following findings of fact in conclusions of law.

First, I would thank all the speakers for coming out and their patience today. We had a long agenda with a lot of

issues, and I'm sorry that we can't do everything sometimes as quickly as we would like to, but I wanted to compliment you all on your involvement and interest in this matter.

What's before us today, although, I think this is the first time we've seem something presented like this, is a fairly common issue in Fairfax County. After the 1978 Zoning Ordnance, there are many existing subdivisions where the lots, for whatever reason, do not meet a current Zoning Ordnance requirement, either as to area or width, or more frequently, as we see it, the structures do not conform to the current setbacks, that is, the structures were built in a certain way, they were legal then, but they couldn't be done in the same way now.

We have many situations in Fairfax County where there are homes constructed on two, and sometimes more than two, lots. That scenario raises other problems for the

neighbors when as now, the price of land has gone way up, there is very little left to build on. We're approaching build out in Fairfax County, and there is an incentive to redevelop many homes as tear-downs. Many of those issues that have been presented to us today, I think, are certainly present in this neighborhood, but not necessarily before us for the purposes of the decision. That is, issues such as the impact on storm water or conformance with the comprehensive plan, or aesthetics, are really legislative issues down the road, and whether the Board of Supervisors or the General Assembly chooses to deal with those, I don't think they're really squarely before us today. The issue in front of us primarily is whether the zoning administrator's determination was correct and that essentially whether these were at the time of their creation, buildable lots, or are they still buildable lots today.

Let me address, also, two of the

procedural issues. I think that based on the record before us, the appealants would have standing to appeal the decision. Sometimes, that is difficult when there's a group of neighbors, rather than individuals, but I think on the record before us, we have neighbors in proximity to the site, also, whose homes are shown on the same subdivision plats that the three plats referenced in 1943 and 1946. I would conclude that they would have an interest in that sufficient -- that they are aggrieved and that they could appeal from the Zoning Administrator's decision.

The second procedural issue dealt with timeliness. That really wasn't squarely presented to us, but I think that on the record before us, the appeal that was filed of the written determination from the Zoning Administrator was timely. I'm not sure that the -- it appeared to me that the determination was the result of a specific request by Supervisor Hyland to more or less

recapitulate what the previous answer was.

Although, we've had this similar situation in other cases, and I think we concluded that to the extent that a determination was without notice to an aggrieved party, that the case in particular I am remembering is where the zoning administrator concluded that handguns could be sold from the condominium unit and the condominium association had no knowledge that the guns were going to be sold, that when association found out and filed the appeal, the 30-day limitation would have been a due process problem for them. However you slice it, I think the appeal was timely.

Then to the merits of the issue. I would conclude on the record before us that the staff analysis in the staff report was correct. I would also conclude Mr. Emrich's observations, aside from the procedural issues, but Mr. Emrich's observations were also correct. Nothing has been shown that I

can see that there was anything wrong with the approval of these lots, at least after the cure provision in the ordnance for the lots prior to 1947. I don't think there's any basis to conclude that lots are somehow abandoned. I first encountered that concept today, I guess, or when preparing the hearing today. There are many old lots in Fairfax County, and just because something is old doesn't mean there's something wrong with it.

I'm not familiar with the concept of "abandonment," as it deals with a recorded subdivision or other division in the land records. I don't think anything persuasive has been shown to us that there was any impropriety in the approval or that Joseph Berry wasn't in fact the county surveyor at that point in time. There are hundreds, if not thousands of plats that this board has seen that Mr. Berry signed in the corresponding time period, and I don't think that there's ever been a dispute that I'm

aware of that Mr. Berry didn't have the authority to sign those plats.

I want to address, also, I think some of the confusion that's been eluded to, some of the concepts that have been argued to us, I think, are conflating one issue with another. I don't see this as a re-subdivision; in fact, I think the subdivision was done in the 40s, and that if I'm understanding the record, nothing has been recorded since 1946.

The same with respect to the question of a rezoning. This board doesn't do rezonings, these property was zoned to the R-3 District at some point in the past, it still is R-3, and nothing we're going to do is going to change that. These properties would all remain subject to all of the requirements in the R-3 District if somebody's going to build a house on them.

Issues such as storm water problems, someone I think said that we said

there was no problem. I would certainly take issue with that. If there is a problem, though, it isn't a Board of Zoning Appeals issue, it's for some other department, and I would hope that with the assistance of whether it's staff, or perhaps, Supervisor Hyland's office, that the appropriate personnel could be contacted about situations such as dumping in a stream, or whatever is resulting from that.

Our role in this process is to call balls and strikes, and the question is, was the Zoning Administrator correct that these lots are still buildable. And I think the answer is yes. There may be some legislative changes as a result of this. That's up to someone else for another day. Maybe there's something the Board of Supervisors can do. I don't know, but I think on the narrower question before us, the Zoning Administrator was correct.

Let me address one other legal

issue. I neglected to say something about, to my mind, the concept of diligent pursuit can be applicable in Virginia in a determination of whether someone has vested rights or not in an approval. But I've always read those cases as dealing with a zoning approval, not a subdivision approval in the past. I said before that I thought some of these issues had been conflated, and I think that in the confusion in the terminology, perhaps, some of these zoning issues or zoning approval issues have been blended with subdivision issues. None of the cases about vested rights or diligent pursuit of an approval, as I understand it in Virginia, have ever dealt with the concept of a recorded subdivision later being challenged. It has always been, to my knowledge, something where someone gets a rezoning or other kind of approval for a special exception or special permit, and then doesn't take action, whether that action be

engineering, construction, or some other activity or expenditure of money in furtherance of what that approval was. I don't read those cases as having anything to do with a subdivision approval, as opposed to a zoning approval.

For those reasons, I think those should be our findings in fact and conclusions of law and that the Zoning Administrator should be upheld.

MS. GIBB: Second.

MR. DIGIULIAN: Second by Ms. Gibb. Discussion?

MR. HAMMACK: Mr. Chairman?

MR. DIGIULIAN: Mr. Hammack?

MR. HAMMACK: I support the motion generally for the reasons set forth by Mr. Hart. Only two things really concern me, is we really didn't hear too much testimony on the issue of standing or on the 30-day appeal, so, before making findings of fact on that when those were really not argued

concerned me a little bit.

I certainly have no objection for Mr. Emrich's remarks and his position, to be part of the record, so, he can make those arguments, but we weren't really presented with this, as we have been in the past on 30-day appeals. Often times, we've had hearings on just whether the appeal has been timely filed. That wasn't really raised here, and we've had hearings on standing. And while I'm sort of inclined to think they -- at least it looks it would be standing, still, we didn't really hear the type of testimony and evidence that we have heard -- and while I have the floor, two other comments.

Some people have mentioned also the tax assessor's records. Well, just to elaborate a little bit on what Mr. Hart said, the tax assessor just doesn't make zoning. We hear those types of arguments from time to time. They do their thing in the way they

identify property for tax purposes, but zoning is created through the Zoning Ordnance.

In addition, there are way more 50 by 100 foot lots in Fairfax County than probably, those of who are still here realize, and these issues come up regularly, and it's happening not only in your neighborhood, but in a lot of other neighborhoods. One thing that came up today in the course of testimony are covenants, and if that might give you all some private rights that aren't before this board, but we, I say regularly, that this board has no equitable powers or authority. Our powers are very limited in what we can do, and while I would agree that your concerns are I'm sure valid, we don't have the jurisdiction or the authority to deal with most of these issues. All we can decide today is whether the Zoning Administrator's opinion was correct or not. That's all I have.

MR. DIGIULIAN: Further discussion?

MR. BEARD: Mr. Chairman?

MR. DIGIULIAN: Mr. Beard?

MR. BEARD: I'm going to have to reluctantly support, as well, the motion. I do this with great trepidation. I live in Mount Vernon. I live in Bell Haven, and I know what's happening in our community, and Hollin Hall is basically there's 10 percent of it, more or less, that's vulnerable to this. I think the lady hit the nail on the head when she said you're basically going to have a de facto R-5 in an R-3.

But having said that, as I say, it's with a heavy heart, but I just think it's what it is. So, I'm going to have to support the motion.

MR. DIGIULIAN: Further discussion? All those in favor of the motion by Mr. Hart?

SPEAKERS: Aye.

MR. DIGIULIAN: Opposed? The motion carries unanimously, and the

determination of the Zoning Administration is upheld.

(Whereupon, at 3:10 p.m., the PROCEEDINGS were adjourned)

* * * * *

APPENDIX B

FAIRFAX COUNTY
VIRGINIA

DEPARTMENT OF PLANNING AND ZONING
Zoning Administration Division
12055 Government Center Parkway, Suite 800
Fairfax, Virginia 22035-5508
(703) 324-1374 Fax (703) 803-6372

October 19, 2005

Concerned Citizens of Hollin Hall Village
c/o Catherine M. Voorhees
8029 Washington Road
Alexandria, Virginia 22303

RE: 8059, 8063 Fairfax Road and 8033, 8037 Washington Road
Hollin Hall Village Subdivision, Section 1
Tax Map Ref: 102-2 ((3)) Lots 77, 78,79,80 and 112,113, 114,115
Zoning District: R-3

Dear Ms. Voorhees:

This is in response to your September 1, 2005 and September 21, 2005 letters regarding the proposed redevelopment of the above-referenced properties in the Hollin Hall Village Subdivision. Received with your letters were attachments that included a legal analysis and certain map information for the above referenced properties, all of which I have carefully reviewed.

At issue is the question of whether the existing houses on the above-referenced lots may be torn down and replaced by two houses with one on each lot. It is my determination that such a proposal may be permitted under the Zoning Ordinance. My position on this question is guided, in part, by fact that the lots in question met the lot size requirements in effect when they were created in 1943 and that, under Sect. 2-405 of the Zoning Ordinance, they could each be developed even though they did not meet the current lot area and lot width requirements of the R-3 District. Par. 1 of Sect. 2-405 states, in pertinent part, as follows:

If a lot was recorded prior to March 1, 1941, or if a lot was recorded prior to the effective date of this Ordinance, and said lot met the requirements of the Zoning Ordinance in effect at the time of the recordation, then such lot, either as a single lot or in combination with other such lots pursuant to a Building Permit, may be used for any use permitted in the zoning district in which located under this Ordinance even though the lot(s) does not meet the minimum district size, lot area and/or lot width requirements of the district, provided all other regulations of this Ordinance can be satisfied. This provision shall not apply to any such lot which, subsequent to the effective date of this Ordinance, is rezoned at the request of the owner or his agent.

Notwithstanding the fact that they have been joined under a Building Permit, the referenced lots have not been the subject of a re-subdivision. Absent owners complying with the requirements of the Subdivision Ordinance and recording new lot lines for their lots, the underlying original lot lines continue to remain in effect and, in accordance with the provisions of Sect. 2-405, the lots are buildable lots.

In the Legal Analysis attached to your September 1, 2005, letter, I understand that you have concluded that the proposed redevelopment of the above-referenced properties in Section 1 of Hollin Hall Village should require a rezoning application. Your opinion is based on the belief that lots on which a single residence is built under a Building Permit at some point in time after their initial recordation should be considered consolidated. Further, your argument implies that Sect. 2-405 is not applicable to these lots as you believe a permitted reduction in lot size should not apply to two or more lots that have a single residence under a Building Permit, even though each of the lots as recorded met the minimum regulations in effect at the time of recordation. This argument suggests that Sect. 2-405 does not apply because the lots in question have, in effect, been subsequently subdivided and that rezoning to a higher density residential district would be necessary to permit development on lots that would otherwise not meet the lot size requirements of the current R-3 District.

Attached to your September 21, 2005 follow-up letter, you have provided a supplemental analysis, in which, as I understand it, you have made the following assertions:

1) The Hollin Hall Village Subdivision plats showing Sections 1 and 2 were not approved by an appropriate County official and, consequently, should not be considered valid.

2) In a memorandum from the County Attorney's Office to Supervisor Hyland's Office, dated August 9, 2005, it was

indicated that the minimum required lot size for lots created in Hollin Hall Village under the Urban Residence District regulations was 5,000 square feet. Your letter states that this is inaccurate, as it disregards the more complete provision which states that required minimum lot size is 5,000 square feet, provided a larger area is not required by the Fairfax County Health Unit. Because sanitary and water hook-ups were not indicated on the approved 1943 Hollin Hall Village subdivision plats, and no Health Department review or approval was indicated, you believe that the lots did not comply with the minimum lot size requirements in effect at the time the lots were created. Additionally, you have referenced the County's Subdivision Control Ordinance in effect between 1947 and 1954 with respect to a provision that requires certain additional improvements in subdivisions that included new public streets and contained building sites less than 10,000 square feet. • I understand your contention is that, since associated road-related improvements were not provided, the minimum lot size under the applicable Subdivision Ordinance was 10,000 square feet.

3) The 1943 Hollin Hall Village recorded lots did not meet the minimum lot area required under the Zoning Ordinance in effect at the time that they were developed (late 1 940's/early 1950's) because the minimum lot size requirement for the Urban Residence District had been amended and increased from 5,000 square feet to an average of not less than 10,000 square feet and a minimum individual lot area of not less than 8,400 square feet.

With respect to the matter of whether the 1943 Hollin Hall Village Subdivision plats depicting Sections 1 and 2 were officially approved in accordance with applicable County regulations, I believe that these plats were officially approved by appropriate County officials and properly recorded among the County's land records in Deed Book 403

at Pages 491A and 493A on March 31, 1943. However, the question of whether these plats were approved by an appropriate County official is ultimately superseded by the fact that the County's Subdivision Ordinance, under Section 101-1-12, provides for the validation of certain divisions of land recorded by metes and bounds or an unapproved plat before September 1, 1947. Therefore, even

if the Hollin Hall Village Subdivision plats recorded in 1943 were not officially approved by an appropriate County official, it would not matter in this case because the lots would be legal and valid under Section 101-1-12 of the Subdivision Ordinance. Subparagraph (a) of Section 101-1-12 reads as follows:

(a) All divisions of land undertaken by the recordation among the land records of Fairfax County prior to September 1, 1947, of a metes and bounds description or a plat not approved by the appropriate County board, agency or official that complied with all applicable provisions of the Zoning Ordinance in effect at the time the description or plat was recorded or at some time thereafter, or meet the provisions of Sect 2-405 of the Zoning Ordinance, except as noted in paragraph (b), are hereby validated and shall for all purposes be deemed to be in compliance with all provisions of the Subdivision Ordinance in effect at the time they were recorded as if they had fully complied with all provisions of said Subdivision Ordinance.

This provision makes clear that the referenced lots in Section 1 and 2 of Hollin Hall Village are valid lots under the Subdivision Ordinance, irrespective of official County approval, as the plats depicting these properties were recorded in the County's land records pnor to September 1, 1947. The applicability of Sect. 101-1-12 in this instance has been discussed with and verified by the Department of Public Works and Environmental Services (DPWES), which is the agency that is responsible for the implementation of the Subdivision Ordinance.

As indicated above, the consolidation of lots under a Building Permit does not constitute an official subdivision of land and, therefore, the original lots can be developed in accordance with Par. 1 of Sect. 2-405 pursuant to new Building Permits and all other applicable Zoning Ordinance regulations. If the lots in question had been consolidated in accordance with the County's Subdivision Ordinance regulations (re-subdivided) I would agree with your opinion. However, this is not the case and the underlying recorded subdivision lots remain as buildable lots.'

With respect to your assertions that the referenced properties did not meet the required minimum lot area (paragraphs 2 and 3 above) I offer the following comments. At the time they were created in 1943, the referenced properties were subject to the Urban Residence District, which required a minimum lot area per structure of 5,000 square feet, provided a larger area was not required by the Fairfax County Health Unit The recorded plats indicate that each of the referenced lots contained an area greater than 5,000 square feet and nowhere on the approved plats or in the recordation was there any indication of restrictions imposed by the County's Health Unit I would, therefore, conclude that the referenced lots met the minimum lot size requirements of the Urban Residence District at the time of

their creation. Your second question on minimum required lot area indicates that the referenced lots are not buildable in their original form because they did not meet the minimum required lot size requirements of the Urban Residence District in effect at the time the referenced lots were eventually developed. You have correctly noted that the Urban Residence District regulations were amended, on April 4, 1951, to increase the required minimum lot area to a minimum average of not less than 10,000 square feet and minimum area of 8,400 square feet. However, as I have previously stated, Sect. 2-405

1 Certain lots in Sections 1 and 2 of Hollin Hall were resubdivided into larger lots by a plat recorded among the land records on June 19, 1946, in Deed Book 494 at Page 178. These lots were renumbered with lot numbers from 500 to 529 and do not include any of the referenced lots.

clearly indicates that if a lot is recorded prior to the effective date of the June 12, 1978 Zoning Ordinance, and said lot met the zoning requirements in effect at the time of recordation, it may be used for any permitted use within the zoning district in which it is located even though it does not meet the current lot size requirements, provided all other regulations can be met including the minimum yard requirements. Since the referenced lots met the zoning requirements at the time of their recordation, they are buildable even though they may not have met the minimum required lot area in effect at the time they were developed or

the current minimum lot area requirement. Incidentally, it should be noted that according to our records, at least one of the referenced properties was originally developed prior to the date on which the Urban Residence District minimum lot area requirement was amended. A Building Permit for the house located on Lots 112 and 113 was issued on August 4, 1949. —In summary, County approved plats of Sections 1 and 2 of the Hollin Hall Village Subdivision were recorded among the County's land records on March 31, 1943. Such plats included the above referenced lots that are deemed buildable in accordance with the provisions of Sect. 2-405 of the Zoning Ordinance, as they met the requirements, including minimum required lot area, that were in effect at the time of their creation. The referenced lots, although subsequently used for a single residence on two lots under Building Permits, have never been consolidated into larger, single lots under the County's Subdivision Ordinance, and thus the originally recorded underlying lot lines remain in effect. The referenced lots are considered to be valid lots under the Subdivision Ordinance and, if a structure that is located on two lots is removed, Building Permits may be issued for the ~development of a single family detached dwelling on each of the originally platted lots if all County and applicable Zoning Ordinance regulations, including minimum yard requirements of the R-3 District, are met.

This letter has been coordinated with DPWES and I trust that it adequately responds to your request. If you should have any further comments or questions, please do not hesitate to contact me, or Jack Reale of my staff at 703-324-1314.

Sincerely,

William E. Shoup
Zoning Administrator

cc: Gerry Hyland, Supervisor
Mt. Vernon District
James P. Zook, Director, Department of Planning and Zoning
Tom Nelson, Office of Site Development Services, DPWES
Hayden Codding, Assistant County Attorney
Jack Reale, Senior Assistant to the Zoning Administrator

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CONCERNED CITIZENS OF HOLLIN HALL VILLAGE, et aL,	:	
Petitioners,	:	
v.	:	CASE NO. CL-2006-0002456
COUNTY OF FAIRFAX BOARD OF ZONING APPEALS, et a!.,	:	
•Respondents.	:	

FINAL ORDER

THIS CAUSE CAME before the Court for trial on October 10, 2006, upon the pleadings filed by the parties hereto and the Writ of Certiorari allowed by the Court pursuant to Va. Code Ann. § 15.2-23 14 (Supp. 2006), to review the decision of the Board of Zoning Appeals of Fairfax County, Virginia ("BZA"), in Appeal Application No. A 2005~MV-055,which upheld the October 19, 2005, determination of the Fairfax County Zoning Administrator that a single-family dwelling may be built on each lot in the Hollin Hall Village subdivision under Fairfax County Zoning Ordinance § 2-405(1); and

UPON CONSIDERATION of the pleadings, the evidence presented, the authorities, and the arguments of counsel, and

for the reasons stated by the Court at the hearing on October 13, 2006; now, therefore, it is hereby

ADJUDGED AND ORDERED that the BZA's decision in Appeal Application No. A 2005-MV-055 is affirmed, and the Petitioners' prayer for relief in the Petition for Writ of Certiorari is denied.

AND THIS CAUSE IS ENDED.

ENTERED this 13 day of October 2006.

//s//
Kathleen H. Mackay, Judge
Fairfax County Circuit Court

WE ASK FOR THIS:
DAVID P. BOBZIEN
COUNTY ATTORNEY

By: //s//
R. Scott Wynn (VSB No. 22380)
Senior Assistant County Attorney
F.Hayden Codding (VSB No. 39785)
Assistant County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
(703) 324 2421
(703) 324-2665 (fax)
Counsel for Respondent Eileen M. McLane, Fairfax County Zoning Administrator

//s//
Jerry K. Emrich, Esquire (VSB No. 4723)

Walsh, Colucci, Lubeley, Emrich & Terpak, P.C.
2200 Clarendon Blvd., 13th Floor
Arlington, Virginia 22201
(703) 528-4700
(703) 528-6050 (fax)
Counsel for Respondents PFK, LLC, PJB, LLC, and Hall Hollin, LLC

No appearance
John P. Di Giulian, Chairman
Fairfax County Board of Zoning Appeals
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035

SEEN:

//s//
David H. Voorhees, Esquire (VSB No. 29139)
8029 Washington Road
Alexandria, Virginia 22308
Counsel for Petitioners

With attached objections.

Objections by the Concerned Citizens of Hollin Hall Village et al.

1. No evidence was entered into the record that the 1941 Zoning Ordinance requirements were met by the 1943/1946 plats.

2. Article 20 definitions of the current Zoning Ordinance for "lot" and "use" as specifically enacted by the Board of Supervisors were not applied for interpreting and administering Section 2-405 of the zoning ordinance.

3. §§15.2-2246 and 15.2-2286 Code of Virginia required Zoning Ordinance to be met prior to recordation in 1950. Thus, decision incorrectly applied the law retroactively. Likewise, vacation of lot lines was not made law until 1950. Finally, Section 2-405 is prospective allowing continuing of 1941 Zoning Ordinance requirements in developed land, not recorded plats.

4. 1943/1946 plats were abandoned, as per the 1941 Zoning Ordinance and Love v. National Bank (Supreme Ct. 1965) and Robertson v. City of Alexandria (Va. Cir. 1998). Love and Robertson both held recorded property no longer exists if 1) never used in the manner recorded. Love further held taxes were not paid for the separate property interest so no property rights were exercised.

5. Not all provisions of the 1978 Zoning Ordinance can be satisfied as required by 2-405 under the Zoning Administrators application of 2-405. In particular, 2-501, 3-301, Article 17 and the Conflict of Laws Section.

6. Under the current Subdivision Ordinance, the Zoning Administrator's decision is not a by-right subdivision. It is a resubdivision of a parcel creating a new lot which requires public notice and public hearing.

7. Thus, the BZA decision fails to meet the current Zoning Ordinance and the current Subdivision Ordinance.

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 8th day of May, 2007.

Concerned Citizens of Hollin
Hall Village, et al., Appellants,

Against Record No. 070058
Circuit Court No. CL—2006-0002456

Board of Zoning Appeals
of Fairfax County, et al.,
Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
Patricia L. Harrington, Clerk

By: //s//

Deputy Clerk

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of June, 2007.

Concerned Citizens of Hollin
Hall Village, et al., Appellants,

Against Record No. 070058
Circuit Court No. CL-2006-0002456

Board of Zoning Appeals
of Fairfax County, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 8th day of May, 2007 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court

Deputy Clerk

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CONCERNED CITIZENS OF HOLLIN HALL VILLAGE, et al,	)	
Petitioners, .	)	
V.	)	Civil Action No.: 2006-2456
COUNTY OF FAIRFAX BOARD OF ZONING APPEALS, et al,	)	
Respondents.	)	

ORDER ON COUNSEL'S MOTION FOR LEAVE TO WITHDRAW APPEARANCE ON BEHALF OF PETITIONERS

THIS MATTER came before the court on the Motion of Brad D. Steele, Esq., James C. Brincefield, Jr., Esq. and Brincefield Hartnett, P.C., to withdraw as counsel for the Concerned Citizens of Hollin Hall Village, and after reviewing the same

IT APPEARS TO THE COURT that good cause exists for the granting of the Motion, now, therefore, it is hereby ADJUDGED, ORDERED, and DECREED as follows:

The Motion is GRANTED and Brad D. Steele, Esq., James C. Brincefield, Jr., Esq. and Brincefield Hartnett, P.C. are hereby removed as attorneys of record for the Concerned Citizens of Hollin Hall Village, and any and all members of said organization, and their appearances are hereby withdrawn.

Until and unless new counsel appears on behalf of the organization, it shall be a pro se party, and any papers required or permitted to be served shall be served on it at the following addresses:

Concerned Citizens of Hollin Hall Village
c/o Gretchen Walzl
7917 New Market Road
Alexandria, Virginia 22308

ENTERED this 14 day of July 2006.

//s//
Judge, Fairfax Circuit Court

WE ASK FOR THIS:
BRINCEFIELD HARTNETT, P.C.

By: //s//
James C. Brincefield, Jr., VSB #06400
526 King Street, Suite 423
Alexandria, Virginia 22314-3144
(T) (703) 836-2880
(T) (703) 549-1924

Counsel for Petitioners

SEEN AND AGREED on condition trial date does not change

Walsh, Colucci, Lubeley, Emrich & Terpak, P.C.

By: ____//s//___

Jerry Emrich, VSB No. 04732

2200 Clarendon Blvd., 13th Floor

Arlington, Virginia 22201

(T) (703) 528-4700

Counsel for Respondents PFK, LLC, Hail Hollin, LLC and PJB,LLC

Seen and Agreed:

F Hayden Codding //s//

Counsel for the Zoning Administrator

SEEN AND AGREED

Fairfax County Attorney

By: _____

F. Hayden Codding, VSB No. 39785

12000 Government Center Parkway, Ste. 549

Fairfax, Virginia 22035

(T) (703) 324-2421

(F) (703) 324-2665

Counsel for Respondent Fairfax County Zoning Administrator and BZA

A COPY TESTE:

JOHN T FREY, CLERK

By:___//s//___

Date 7-14-06

Fairfax County, Virginia

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

CONCERNED CITIZENS OF HOLLIN HALL VILLAGE, et aL,	)	
Petitioners,	)	
v.	)	CIVIL ACTION NO. 2006-2456
COUNTY OF FAIRFAX BOARD OF ZONING APPEALS, et al.,	)	
Defendants.	)	

ORDER ON WITHDRAWAL OF APPEARANCE BY VENABLE LLP

It appearing to the Court that Catherine M. Voorhees as counsel and Venable LLIP initially entered their appearance on behalf of the petitioners, and it further appearing that James C. Brincefield, Jr. and the law firm of Brincefield Hartnett, PC previously entered their appearance as counsel for petitioners to substitute for Venable LLP, and subsequently withdrew from the case, and it appearing that the Court has recognized that the petitioners are proceeding pro se in this matter, it is hereby

ORDERED that the appearance of Catherine M. Voorhees as counsel and Venable LLP as counsel for petitioners is withdrawn and that Catherine M. Voorhees will continue in the case as a pro se petitioner; and further

ORDERED that a copy of this Order be delivered to all petitioners.

Entered this 6 day of Oct , 2006

//s//

JUDGE

We ask for this:
VENABLE LLP

//s//

Michael W. Robinson
VSB No. 26522
8010 Towers Crescent Drive, Suite 300
Vienna, VA 22182
(703) 760-1988
(703) 821-8949 (facsimile)
mwrobinson@venable . com

Seen and Agreed:
WALSH, COLUCCI, LUBELEY, EMRICH & TERPAK, P.C.

Jerry Emrich
VSB No. 04732
2200 Clarendon Blvd., 13th Floor
Arlington, VA 22201

(703) 528-4700

Seen and Agreed:

F. Hayden Codding
VSB No. 39785
Fairfax County Attorney's Office
12000 Government Center Parkway, Suite 549
Fairfax, VA 22035
(703) 324-2421
(703) 324-2665 (facsimile)

Seen:

Gretchen Walzl, Petitioner

Seen:

David H. Voorhees, Petitioner

Seen:

Catherine M. Voorhees, Petitioner

Seen:

Mark Welch, Petitioner

Seen:

Nancy Welch, Petitioner

Seen:

Joan T. Coe, Petitioner

Seen:

Eugene A. Groshong, Petitioner

Seen:

Robin Smith, Petitioner

Seen:

Melvin Smith, Petitioner

Seen:

James Stein, Petitioner

Seen:

Karen Stein, Petitioner

APPENDIX H

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
APPLICATION FOR APPEAL

RECEIVED
Dept of Planning & Zoning
NOV 1 0 2005
Zoning Administration Div

APPLICATION NO. A2005-MV-055
(Assigned by Staff)

NAME OF APPELLANT: Concerned Citizens of Hollin Hall Villlage

NATURE OF THE APPEAL:

Appeal of the Zoning Administrator's determination that an existing, conforming use can be redeveloped into a new non-conforming use. That is, an existing dwelling unit on two recorded lots cannot be redeveloped by tearing down the existing house and building two new dwelling units on the existing lot.

DATE OF ORDER, REQUIREMENT, DECISION, DETERMINATION OR NOTICE OF VIOLATION WHICH IS SUBJECT TO THE APPEAL October 19. 2005

HOW IS THE APPELLANT AN AGGRIEVED PERSON

The Concerned Citizens of Hollin Hall Village are property owners in the Hollin Hall Village Subdivision, most of the members own property in the Section of Hollin Hall and are adjacent property owners of so-called double lots. See attachment

IF APPEAL RELATES TO A SPECIFIC PROPERTY, PROVIDE THE FOLLOWING INFORMATION

POSTAL ADDRESS OF PROPERTY: 8059 & 8063 Fairfax Road and 8033 & 8037 Washington Road

TAX MAP DESCRIPTION: 1022030077,1022030079, and 102203117 & 1022030114

The undersigned has or has not (circle one) the authority to allow and does or does not (circle one) authorize Fairfax County staff representatives on official business to enter on the subject property as necessary to process the application.

Type or Print Name of Appellant or Agent

Catherine M. Voorhees on behalf of Concerned Citizens of Hollin Hall Village

Signature of Appellant or Agent

//s//

Address

8029 Washington Road, Alexandria, VA 22308

Telephone No. Home / Work

Please provide name and phone number of contact person if different from above.

DO NOT WRITE IN THIS SPACE

Subdivision Name: Hollin Hall Village

Total Area (Acres/Square Feet): 1.243

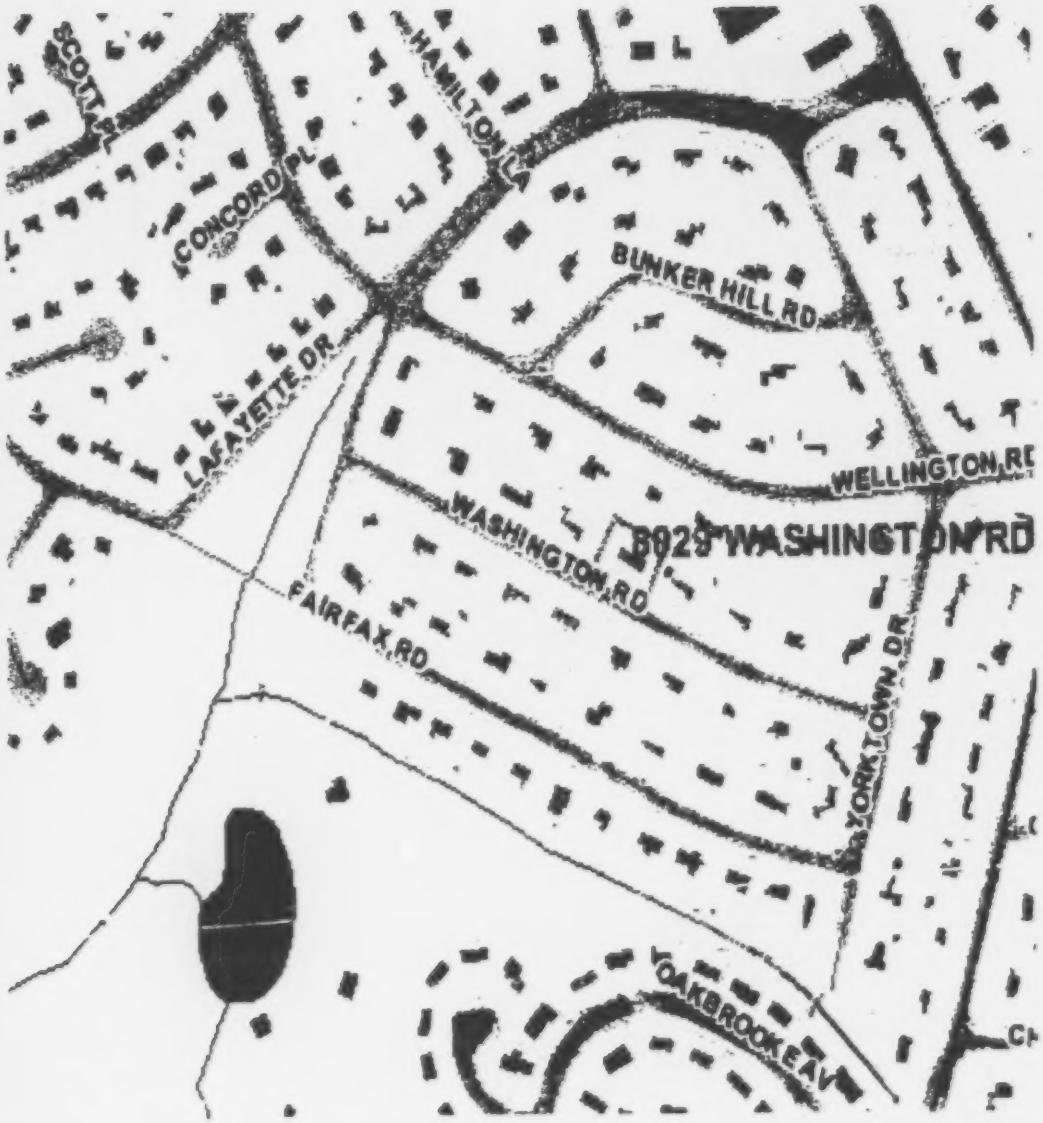
Present Zoning: R-3

Supervisor District: Mount Vernon

Date application received:11/10/05 Application Fee Paid: $375.00

Date application accepted: 11/22/05

APPENDIX I


SCOTT PL
CONCORD PL
HAMILTON LA
BUNKER HILL RD
LAFAYETTE DR
WELLINGTON RD
8929 WASHINGTON RD
WASHINGTON RD
FAIRFAX RD
YORKTOWN DR
OAKBROOK AV

APPENDIX J

LAND USE

INTRODUCTION

In less than a generation, Fairfax County has been transformed from a residential suburb of the Nation's Capital, into a complex commercial, residential, office, and research community. This extraordinary transformation is reflected in the County's land use pattern. Fairfax County has become the region's pre-eminent location for new office, research, and shopping center development. Between 1970 and 1995, the number of acres in non-residential land uses, excluding public facilities, quadrupled, expanding by 463 percent. At the same time, the number of acres in residential land use in the County grew by 168 percent. While single-family detached housing continued to be the predominate residential land use, the combined development of townhouses and apartments out paced single-family detached housing since 1970 at a rate of 6 to 4 and since 1990, out paced single family dwelling units at a rate of 2 to 1.

One of the effects of growth in Fairfax County is the impact on the public facilities and infrastructure systems. A principal concern, raised in the public participation process, is the effect of growth on mobility, especially the impact on the road system in peak periods. Developing and implementing effective measures to address mobility is a principal challenge for Fairfax and for other rapidly urbanizing areas. While there may be no practical solution to returning the County to pre-boom levels of service, managing the interacting elements of congestion is required

if the County is to influence forces, which if left unattended, will degrade current service levels. The County needs to manage the expansions of transportation capacity, manage the reduction of transportation demand; and the County needs to manage the pace, the intensity and the pattern of growth.

Another effect of Fairfax County growth has been a diminishing supply of vacant land. If current trends continue, the supply of land presently planned for residential development will be all but exhausted shortly after the turn of the century. This impending land shortage has implications not only for the residential development pattern that may emerge, but also for existing residential development. As land values increase due to decreasing supply, the pressure to redevelop existing lower density neighborhoods, as well as non-residential acreage, will increase. While in selected instances this may be desirable, the practice of redevelopment must be carefully controlled so as to not undermine stable neighborhoods and the provision of public services and facilities. The loss of neighborhoods can quickly lead to a loss of a sense of community: a basic facet of a high quality of life. The County's ability to secure sites for parks, schools and public facilities and to provide affordable housing opportunities also is greatly affected by the short supply of land.

This element of the Plan recognizes the changes that have taken place in the County and the challenges that lie ahead. The objectives and policies presented in this section provide guidance for an appropriate pattern and pace of development and they indicate how this development should relate to the existing and future community. They also provide a logical framework for land-use decision-making at a conceptual level as well as on an area-wide and site specific basis. Uniform application of these objectives and policies should result in a balanced and harmonious

community where a high quality of life can be maintained. Since all policy areas, whether housing, employment or the environment achieve physical realization through the land use plan, the development and implementation of sound and consistent land use principles is critical to the realization of County goals.

Page 2

The countywide objectives and policies for land use have been organized under four broad headings:

- Land Use Pattern
- Land Use Intensity
- Pace of Development
- Land Use Compatibility

BOARD OF SUPERVISORS GOALS

Fairfax County has adopted a specific goal for land use as well as related goals which provide additional land use direction and guidance in the areas of transportation, revitalization, private sector facilities and employment. These goals read as follows:

Land Use - The County's land use policies should maintain an attractive and pleasant quality of life for its residents; provide for orderly and coordinated development for both public and private uses while sustaining the economic and social well-being of the County; provide for an adequate level of public services and facilities, including a system of transportation facilities, to sustain a high quality of life; and ensure sound environmental practices in the development and redevelopment of land resources. Growth should take place in accordance with criteria and standards designed to preserve, enhance, and protect an orderly and aesthetic mix

of residential, commercial/industrial facilities, and open space without compromising existing residential development. The Comprehensive Land Use Plan should set forth long-range recommendations and implementation techniques to ensure the envisioned coordination of harmonious development, while still achieving our economic goals. Densities and heights in excess of those compatible with these goals should be discouraged, nor should these policies be construed as incompatible with the County's affordable housing goal.

Transportation - Land use must be balanced with the supporting transportation infrastructure, including the regional network, and credibility must be established within the public and private sectors that the transportation program will be implemented. Fairfax County will encourage the development of accessible transportation systems designed, through advanced planning and technology, to move people and goods efficiently while minimizing environmental impact and community disruption. Regional and local efforts to achieve a balanced transportation system through the development of rapid rail, commuter rail, expanded bus service and the reduction of excessive reliance upon the automobile should be the keystone policy for future planning and facilities. Sidewalks and trails should be developed as alternate transportation facilities connecting mass transit, high density areas, public facilities and employment areas.

Open Space - Fairfax County should support the conservation of appropriate land areas in a natural state to preserve, protect and enhance stream valleys, meadows, woodlands, wetlands, farmland, and plant and animal life. Small areas of open space should also be preserved in already congested and developed areas for passive

neighborhood uses, visual relief, scenic value, and screening and buffering purposes.

Revitalization - Fairfax County should encourage and facilitate the revitalization of older commercial and residential areas of the County where present conditions warrant. Revitalization initiatives should encourage business development, promote public and private investment and reinvestment, and seek to prevent or eliminate the negative effects of deteriorating commercial and industrial areas. Revitalization efforts should work in concert with other community programs and infrastructure improvements and strive to foster a sense ...

Page 10

Policy b. Encourage infill development in established areas that is compatible with existing and/or planned land use and that is at a compatible scale with the surrounding area and that can be supported by adequate public facilities and transportation systems.

Policy c. Achieve compatible transitions between adjoining land uses through the control of height and the use of appropriate buffering and screening.

69

07-383

FILED
OCT 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVID H. AND CATHERINE M. VOORHEES,
HUSBAND AND WIFE,

Petitioners,

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY,
EILEEN M. MCLANE, FAIRFAX COUNTY
ZONING ADMINISTRATOR,
PJB, LLC, PFK, LLC AND HALL HOLLIN, LLC,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

JERRY K. EMRICH
WALSH, COLUCCI, LUBELEY,
EMRICH & WALSH, P.C.
2200 Clarendon Boulevard
13th Floor
Arlington, Virginia 22201
(703) 528-4700

Counsel for Respondents
PJB, LLC, PFK, LLC,
and Hall Hollin, LLC

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Summary of the Argument 1

Argument 2

I. The Zoning Classification Provisions Related To Density Were Not Violated 2

II. Burden Of Proof 3

III. All Petitioners Were Represented By Counsel Of Their Choosing 5

IV. The Scope Of The Review By The Board Of Zoning Appeals Was Not Limited By County Staff 11

Conclusion 11

TABLE OF AUTHORITIES

Page(s)

CASES:

Snow v. Amherst County Board of Zoning Appeals, 248 Va. 404 448 S.E. 2d 606 (1994) 3

STATUTES:

Va. Code §15.2–2266 3

ORDINANCES:

Fairfax County Zoning Ordinance, Section 2-405 .... 2, 3, 4

Fairfax County Code, Section 101-1-12 3-4

This Opposition to the Petition for Writ of Certiorari is being filed by PJB, LLC, PFK, LLC and Hall Hollin, LLC, which are the owners of the lots involved in this case.

STATEMENT OF THE CASE

This case involves the redevelopment of existing lots in a subdivision in Fairfax County, Virginia. The subdivided lots were established in 1943 and re-established in 1946. Single houses were constructed that straddled the lot line between two lots, thus one house occupied two lots. This case resulted from the demolition of the existing houses for the purpose of constructing one house on each lot.

The Fairfax County Zoning Administrator ruled the redevelopment was permitted by the Fairfax County Zoning Ordinance. The ruling was appealed to the Fairfax County Board of Zoning Appeals (BZA). The BZA upheld the decision of the Zoning Administrator. The BZA's decision was appealed to the Circuit Court of Fairfax County which upheld the BZA. The Virginia Supreme Court denied the appeal of the decision of the Circuit Court, as well as the petition for rehearing.

SUMMARY OF THE ARGUMENT

This case involves a dispute over the interpretation of a local zoning ordinance. It does not involve a rezoning or a re-subdivision of property as the Petitioners would have the Court believe. It involves redevelopment of existing subdivided lots that have been determined by the Zoning Administrator, the BZA, the Circuit Court and the Virginia Supreme Court to be consistent with applicable law. There is no suggestion in Virginia law that a property owner has a property right to the continuation of the existing use of another's property. Thus, the Federal Constitution is not implicated by the change of use of another's property or the process leading to the change of use

of another's property. The Petitioners have been granted the legislatively created right to challenge the change in use of another's property, and they have fully availed themselves of that right.

The Petitioners now seek to create Federal Constitutional issues where none exist, and where none were raised in the Circuit Court below. In the process, the Petitioners ignore controlling principles of law, as well as the proceedings below. As to one issue, the Petitioners misrepresent what transpired at the proceedings in the Circuit Court. The Petition should be denied.

ARGUMENT

I. The Zoning Classification Provisions Related To Density Were Not Violated

There was no rezoning of the lots involved in this appeal, nor was there an unauthorized increase in density. The density permitted in every zoning classification of Fairfax County is controlled by Section 2-405 of the Fairfax County Zoning Ordinance, which provides in pertinent part:

> If a lot was recorded prior to March 1, 1941, or if a lot was recorded prior to the effective date of this Ordinance, and said lot met the requirements of the Zoning Ordinance in effect at the time of recordation, then such lot, either as a single lot or in combination with other such lots pursuant to a Building Permit, may be used for any use permitted in the zoning district in which located under this Ordinance even though the lot(s) does not meet the minimum district size, lot area and/or lot width requirements of the district, provided all other regulations of this Ordinance can be satisfied.

It was factually determined by the Zoning Administrator, the BZA and the Circuit Court that Section 2-405 of the Fairfax County Zoning Ordinance applied to the lots at issue. In addition, there is no suggestion in Virginia law that one has a property right to insist that another property owner cannot change the use of his property. In fact, a property owner does not have a property right to the existing zoning on his own property. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E. 2d 606 (1994).

II. Burden Of Proof

Evidence, sufficient to overcome any imagined burden, was presented by the Zoning Administrator to the BZA that the subdivision plats recorded in the 1940's were properly approved. (January 24, 2006 Report to the BZA). However, the burden issue is moot, because state legislation (Virginia Code Section 15.2-2266), and the Subdivision Provisions in the Fairfax County Code (Section 101-1-12) validate subdivisions recorded prior to January 1, 1953 and September 1, 1947, respectively. Specifically, Virginia Code Section 15.2-2266 states:

> Validation of certain plats recorded before January 1, 1953.—Any subdivision plat recorded prior to January 1, 1953, if otherwise valid, is hereby validated and declared effective even though the technical requirements for recordation existing at the time such plat was recorded were not complied with.

Specifically, the Subdivision Provisions in the Fairfax County Code Section 101-1-12 states

> Validation of certain divisions of land recorded by metes and bounds or an unapproved plat before September 1, 1947. (a) All divisions of land undertaken by the recordation among the land records of Fairfax County prior to September 1, 1947, of a

metes and bounds description or a plat not approved by the appropriate County board, agency or official that complied with all applicable provisions of the Zoning Ordinance in effect at the time the description or plat was recorded or at some time thereafter, or meet the provisions of Sect. 2-405 of the Zoning Ordinance, except as noted in paragraph (b), are hereby validated and shall for all purposes be deemed to be in compliance with all provisions of the Subdivision Ordinance in effect at the time they were recorded as if they had fully complied with all provisions of said Subdivision Ordinance.

(b) Any lot or parcel that is the result of a division of land undertaken by the recordation among the land records of Fairfax County prior to September 1, 1947, of a metes and bounds description or a plat not approved by the appropriate County board, agency or official which did not comply with the applicable minimum district size, lot area and/or lot width provisions of the Zoning Ordinance in effect at the time the description or plat was recorded or at some time thereafter, or does not meet the provisions of Sect. 2-405 of the Zoning Ordinance is hereby designated as an outlot under the Subdivision Ordinance and shall not constitute a buildable lot.

The deeds of subdivision for Hollin Hall Village were recorded in 1943, and a deed of re-dedication and re-subdivision and plat were recorded in 1946, and therefore, are valid.

III. All Petitioners Were Represented By Counsel Of Their Choosing

The trial transcript contradicts the Petitioners' statement appearing on Page 25 of their Petition that it was made clear in the Circuit Court that David Voorhees was not the official counsel for the Plaintiffs in the Circuit Court. The transcript also contradicts the Petitioners' statement on Page 27 of their Petition that the Circuit Court "appointed" David Voorhees to be counsel for the Plaintiffs. The following exchange appears on pages 30-37 of the transcript:

> MR. EMRICH: "Well, if it please the court, and I don't want to beat a dead horse, but David Voorhees entered his appearance in this case and has not withdrawn on behalf of –"
>
> THE COURT: "Right now he's the lawyer for the group then; right?"
>
> MR. EMRICH: "Well, yes, he has entered his appearance."
>
> THE COURT: "I have a large file. I have no idea where he entered his appearance."
>
> MR. EMRICH: "Well, he filed -- and correct me if I'm wrong -- he filed a motion. It was either to oppose our intervention—."
>
> MR. VOORHEES: "Yes, I filed a motion to oppose the intervention. And then we brought in other counsel to argue that motion. But I did not withdraw my appearance. But I'm not sure that I entered an appearance on behalf of the whole group, or whether I just brought it on behalf of myself. I can't remember exactly how – what the – "
>
> MS. VOORHEES: "You substituted for me."

MR. VOORHEES: "Okay. Oh, I did?"

MS. VOORHEES: "Yes."

MR. VOORHEES: "Then I represented the whole group. And I have not withdrawn, Your Honor."

THE COURT: "So I guess you're the lawyer for the whole group; is that what you think? Is that what you think, Mr. Emrich?"

MR. EMRICH: "Well, Your Honor, I just think, as Mr. Wynn stated, I think we have an obligation to raise the issue with the court, if we think there's a possibility of unauthorized practice of law. So that's why we originally raised it. And as to whether or not Mr. Voorhees is going to withdraw now, I mean, I don't know the answer to that. He's still – As I understand the rule, he's still attorney of record in the case."

THE COURT: "Mr. Voorhees, do you work in your own firm, or what is your –"

MR. VOORHEES: "In my capacity as an individual lawyer, not as part of my firm. But, you know, we can continue."

THE COURT: "I'm sorry, sir, you said what?"

MR. VOORHEES: "I said, I will – If I am of counsel in the case, then we can just continue on that basis, I guess."

THE COURT: "So you're going to represent all the plaintiffs as a lawyer?"

MR. VOORHEES: "Yes."

THE COURT: "Okay."

MR. VOORHEES: "If I have everyone's consent."

THE COURT: "Well, then I guess the Concerned Citizens of Hollin Hall Village are back in the case, if Mr. Voorhees is representing everyone."

"(Ms. Voorhees and Mr. Voorhees conferred briefly.)"

MR. VOORHEES: "Yes, ma'am."

THE COURT: "Okay. Sir, then I guess you're going to put on the case."

MR. VOORHEES: "Well, can I have my assistant counsel put on the case, since she's an attorney?"

THE COURT: "She's not affiliated with you, sir is she?"

MS. VOORHEES: "I'm married to him."

THE COURT: "I know you're married to him. But I don't think you're affiliated with him."

MR. VOORHEES: "But she's a petitioner. Can't she present evidence?"

THE COURT: "No."

MR. WYNN: "I would object, Your Honor, to her participating in the case."

(Ms. Voorhees had previously been Counsel in this case for all parties, but she had withdrawn before trial.)

THE COURT: "It's the same old problem."

MR. VOORHEES: "But – "

THE COURT: "Come on, if you're the lawyer— "

MR. VOORHEES: "But we're all individual petitioners, as well."

THE COURT: "Well, I'm not going to --I suppose –

Mr. Wynn?"

MR. WYNN: "Well, I was just going to say that he is now saying that he's going to represent everybody. But now he also wants everybody to represent themselves. I think that they have to be consistent. Either you're going to be the attorney for these people and speak for all of them, or they all have to speak for themselves."

THE COURT: "Let me have the Voorhees think about that for just a second. But let me ask you another question. So the BZA says that these people are aggrieved. And they are going to testify individually, I take it, about the ways in which their particular houses are affected by this particular development?"

MR. WYNN: "Your Honor, I don't know what their case is, other than what they have argued in their brief."

THE COURT: "But in order for them to be individually involved and individual pro se petitioners, that's what they would have to do. The brief doesn't talk about – I mean, the brief doesn't talk about, as I recall, people's individual grievances with regard to their neighborhood. The brief talks about these global issues, about zoning and subdivision and approvals and everything else."

MR. WYNN: "That's correct, Your Honor."

THE COURT: "This brief is a brief that would be filed by a lawyer – "

MR. WYNNE: "Yes, Your Honor."

THE COURT: "—representing a group, not by individual petitioners."

MR. WYNN: "And if Mr. Voorhees is going to represent these people, as counsel, then he has to speak for the group. He has to present their case."

THE COURT: "Okay. Mr. Voorhees, it appears to me at this point that – And you might want to look through your file and satisfy yourself that you made an appearance. I don't mean to railroad you into this. If you made an appearance, perhaps you want to find it so that Mr. Emrich and I are on the same page, and you. But right now it looks like you're representing the group, which means that you have to function as a lawyer in this court."

MR. VOORHEES: "Right."

THE COURT: "Which may not be as hard as you think it is."

MR. VOORHEES: "No. The only thing is that she had prepared -- "

THE COURT: "Your wife is going to lose – "

MR. VOORHEES: "She had prepared to argue the case, more than I had. But – "

THE COURT: "Well, that's the way it goes."

MR. VOORHEES: "All right."

THE COURT: "Now, is your wife going to lose her job, because you're standing up and representing the group?"

MR. VOORHEES: "I don't think so."

MS. VOORHEES: "I've consulted with the Virginia State Bar. And they tell me that they may retaliate, but they don't have a case, that the Virginia State Bar would not agree with their position, if he argued the case."

THE COURT: "Well, that's kind of a sad way to go, in terms of – Okay. Then we are all set then. I think we're all set. We've torturously gone through the whole thing. Any other questions that anyone has at this point before I take opening statements? No?"

MR. VOORHEES: "No questions."

THE COURT: "Okay. Mr. Emrich, I'm glad you brought that up, about his making an appearance, because I think that saved the lawsuit in a way that will enable us to go forward today."

MR. EMRICH: "Yes, Your Honor. I think that was what I had to do."

THE COURT: "Mr. Voorhees."

MR. VOORHEES: "Your Honor, are you ready?"

THE COURT: "Uh-huh."

Counsel is not aware of a constitutional principle that a party may both represent herself and be represented by an attorney.

IV. The Scope Of The Review By The Board Of Zoning Appeals Was Not Limited By County Staff

The notice to which the Petitioners refer to on Page 28 of their Petition is notice to the public that the BZA will consider the appeal of the Petitioners. The notice goes on to identify the addresses of the properties involved, and to state where anyone who is interested can review a copy of the appeal application. (BZA R.082). There is nothing in the record that suggests that one BZA member, whose statement the Petitioners quote, let alone a majority of the BZA members, were of the opinion that staff had limited them in the performance of their duties. This argument of the Petitioners is simply a disagreement with an interpretation of a local zoning ordinance.

CONCLUSION

WHEREFORE, the Respondents respectfully request that the Petition be denied.

Respectfully submitted,

JERRY K. EMRICH
WALSH, COLUCCI, LUBELEY,
EMRICH & WALSH, P.C.
2200 Clarendon Boulevard
13th Floor
Arlington, Virginia 22201
(703) 528-4700

Counsel for Respondents
PJB, LLC, PFK, LLC,
and Hall Hollin, LLC

71

(3)

No. 07-383

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID H. and CATHERINE M. VOORHEES,
husband and wife,

Petitioners

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY,
EILEEN M. McLANE,
FAIRFAX COUNTY ZONING ADMINISTRATOR, PJB
LLC, PFK LLC and HALL HOLLIN LLC,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE VIRGINIA SUPREME COURT

REPLY BRIEF FOR PETITIONERS

David H. and Catherine M. Voorhees
8029 Washington Road
Alexandria, Virginia 22308
(703) 765-7551

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Zoning Administrator Did Not Have the Authority to Subdivide Parcels 1

II. Unfair Assignment of Burden of Proof. 4

III. Petitioners Chose to Represent Themselves *Pro Se* 7

IV. Substantive Due Process Was Denied When County Divided Consolidated Lots Thereby Increasing Density In Their Restatement of Petitioners' Appeal 7

Conclusion 9

INDEX TO APPENDICES

Article 1, § 400 of the Zoning Ordinance 1A

§§ 306 and 401 of the Zoning Ordinance 2A

Article 9, §610 of the Zoning Ordinance 3A

§101-2-1(B) of the Subdivision Ordinance 4A

TABLE OF AUTHORITIES CITED

Cases **Page**

Snow v. Amherst County Board of Zoning Appeals, 248, Va. 404, 448 S.E. 2d 606 (1994) 4

Williams v. Administrator of NASA, 463 F.2d 1391 (CCPA 1972), *cert. denied* 412 U.S. 950 (1973) 5, 6

Constitutional Provision

XIV Amendment 8

Statutes

Va. Code §15.2-2307 ..... 3, 4
Va. Code §15.2-2284 3
Va. Code §15.2-2261 ..... 3, 5, 6
Va. Code §15.2-2266 ..... 6, 7

Ordinances

1978 Fairfax County Zoning Ordinance Regulations
Article 1, Section 400 3
Article 2, Section 306 1
Article 2, Section 401 3
Article 2, Section 405 ..... 3, 4
Article 2, Section 601 3
Article 2, Section 602 3
Article 3, Section 301 3
Article 3, Section 308 3
Article 9, Section 610 ..... 1, 2, 4
Article 9, Section 001 2
Article 17, Section 104 3
Article 20, definition of Lot 1

Fairfax County Code, Section 101-1-12 ..... 6, 7
Fairfax County Code, Section 101-2-1(B) 8

REPLY BRIEF FOR THE PETITIONERS

Introduction

The Petitioners' submission is straightforward: The constitutional right to be heard is a basic tenet of government decisionmaking, which includes substantive due process to guarantee fundamentally just and fair governmental action.

I. The Zoning Administrator Did Not Have the Authority to Subdivide Parcels.

It is the **Board of Supervisors**, alone, that has the authority to permit new construction of a dwelling unit on an area of land having a size or width less than required by the zoned district[1] (redevelopment). Otherwise, the new structure would be erected contrary to Article 9, Section 610 of the Zoning Ordinance: "The Board may approve, either in conjunction with the approval of a rezoning or as a special exception, the waiving of the minimum district size and/or lot width requirement for an R District ...".

The waiver ability of the Board of Supervisors is limited. Only lots that do not meet the minimum district size or minimum lot width can be waived if "1. Such lot has not been reduced in width or area since the effective date of this Ordinance to a width or area less than required by this Ordinance." Article 20 of the 1978 Zoning Ordinance defines a lot as follows: "For the purpose of this Ordinance, a parcel of land that is designated at the time of application of ... a Building Permit ..., as a tract all of which is to be used, developed or built upon as a unit under single ownership. ..." Thus, a division of the parcel of land upon

[1] Article 2, Section 306, 4. of the Fairfax County Zoning Ordinance.

which one house was built, in 2005, is a reduction in the lot width and area that occurred after 1978, and the Board of Supervisors would not be permitted to waive the minimum regulations of the R-3, residential district.

The controlling principals of law, upon which Petitioners rely, include all of the provisions of the Zoning Ordinance. The drafters of the 1978 Fairfax County Zoning Ordinance enacted Article 9, Section 610 to authorize **elected** officials (i.e., the Board of Supervisors) to permit new construction on any "lot" that does not meet the minimum size regulations of a zoned district, as smaller lot sizes than that required in the R-district would impact the existing neighborhood.[2] If elected officials cannot waive the minimum size requirements as explained above, non-elected officials (i.e., Zoning Administrator) cannot have that authority.

However, contrary to the foregoing ordinance, in 2005, the Fairfax County Zoning Administrator divided the parcels or consolidated lots identified by the Tax Map Description to include plat lots recorded in 1943 thereby effectively changing the size and width of the parcel or lot that existed in 1978.[3]

The division of the parcels involved in this appeal would result in a de-facto R-5 zoning classification in an R-3 neighborhood, as one BZA member noted[4], or a rezoning without notice or a public hearing. R-5 is a denser zoning classification than R-3 and common sense would dictate that

---

[2] The purpose and intent of Article 9 (9-001) states: "There are certain uses ... which by their nature or design can have an undue impact upon or be incompatible with other uses of the land."

[3] BZA Record at page 101.

[4] See page A-13, lines 11-13 in the Petition for Writ of Certiorari.

replacing one house with two houses increases the density of the residential neighborhood.

One lone provision in the Zoning Ordinance does not control numerous other regulations in the Zoning Ordinance, especially when the lone regulation states, "provided all other regulations of this Ordinance can be satisfied."[5] As cited in the Petition for Writ of Certiorari, the County has acknowledged that one provision (§3-301) cannot be met, but has baldly asserted that the lone provision, which requires all other zoning regulations to be satisfied, can be applied. Is this fundamental justice?

Article 2, Section 401 of the Zoning Ordinance only allows a lot that exceeds the minimum provisions of the Ordinance to be subdivided to create new lots which comply with the minimum provisions of the zoning district. The Tax Map Description of the parcels or lots identified by Petitioners conform to the R-3, zoning classification. As Respondents agree, the divided, resultant new lots are smaller than the minimum requirements of the R-3 Zoning district.

Article 3, Sections 301 and 308 of the Zoning Ordinance cannot be satisfied. Similarly, Article 2, Sections 601-602 and Article 17, Section 104 cannot be satisfied. In addition, the decision of the non-elected official is inconsistent with several provisions of the Virginia Code.[6]

If there is a conflict among the regulations of the Zoning Ordinance, it is the regulation that imposes a greater

---

[5] See last two lines of Section 2-405 reprinted on page 2 of Respondents' Brief in Opposition.

[6] Va. Code §§ 15.2-2261, 15.2-2284, 15.2-2307, among others.

requirement or a higher standard that applies.[7] Article 9, Section 610 applies a greater requirement (a special exception) and a higher standard (the Board of Supervisors authorization). Thus, a **waiver** of the minimum district size and lot width by the Board of Supervisors is required before new construction can be built on half of the land upon which one house previously stood.

Respondents reliance on *Snow v. Amherst County Board of Zoning Appeals*, 248, Va. 404, 448 S.E. 2d 606 (1994) is misplaced. First, *Snow* is directed to property owners arguing that they have a vested right. Second, the Virginia Assembly amended the Va. Code §15.2-2307 to include the governmental action that they relied upon when expending money to prepare for development of the parcel. In the present case, if a non-elected official can decide to double the density of a neighborhood without notice or a public hearing, adjacent property owners cannot rely upon their zoning classification. Unlike the Snows, the Petitioners here seek to have the present Zoning Ordinance enforced to protect the property rights of the residents of the neighborhood. We ask this Court to review this governmental action.

II. Unfair Assignment of Burden of Proof

Respondents gloss over the proceedings at the BZA, where Petitioners argued that lots recorded in 1943 did not meet all of the minimum requirements of the Zoning Ordinance,[8] as required by Section 2-405 of the Zoning Ordinance, upon which Respondents rely exclusively. Since the County was and is in control of the records from the time of creation in 1943, the burden should have been placed on

---

[7] Article 1, Section 400 of the Zoning Ordinance.

[8] BZA Record at pages 473-475.

the County to prove that the plats met all of the requirements of the Zoning Ordinance. See *Williams v. Administrator of NASA*, 463 F.2d 1391 (CCPA 1972), *cert denied* 412 U.S. 950 (1973).

In *Williams*, the Court held:

> We think the wisest course to follow is to fall back to the basic tenets of the law of evidence, three of which should control here - (1) the burden of proof generally lies on the party asserting the affirmative of a proposition, 9 Wigmore on Evidence, § 2486 (3d ed. 1940) or the party seeking to change the present state of affairs, McCormick, Evidence § 337 (2d ed. 1972); (2) Where a party is in a position to have peculiar knowledge of the facts with regard to an issue, the burden of proof as to that issue lies upon that party, id.; and (3) the burden of going forward with the evidence on an issue generally rests upon the party having the burden of proof on that issue. McCormick, Evidence, § 337, supra, 9 Wigmore on Evidence, supra, § 2487. *Williams* at 1400.

In the present case, it is Fairfax County that is asserting that the old 1943 plats met the requirements for recordation, and since the county has had custody and therefore peculiar knowledge of all of the documents that could that support that proposition since 1943, the burden should be on Fairfax County to prove the plats met the recordation requirements in 1943 and not the petitioners. Therefore, since the county did not meet their burden that the old plats met the recordation requirements, then the lots as developed in the late 1940s and early 1950s determine the proper zoning for the neighborhood and not the improperly recorded 1943 plat.

Respondents' reliance on a Subdivision Ordinance that was enacted after the neighborhood in question was completed is misplaced. Va. Code §15.2-2261 states that for five years after recordation of a plat, there can be no change or amendment to a local ordinance so that a developer can complete an approved development.[9] Nowhere does the Code of Virginia provide enabling legislation to permit a developer to redevelop an existing community (create a second development) based on an old recorded map.

To the contrary, the Virginia Code only provides 5 years for the recorded plat to be developed before local ordinances, such as the Zoning Ordinance, trump the recorded plat. Since the plat was recorded in 1943, all Zoning Ordinance regulations after 1948, including the requirements of larger "lot" sizes are effective. Neither Section 101-1-12 of the Fairfax County Code nor Va. Code §15.2-2266 provide exceptions to the current zoning ordinance regulations.

In fact, Va. Code §15.2-2261 requires the plat to be valid in order for the five (5) year exception to new ordinances be applicable.[10] Thus, the fact that the deeds of subdivision are valid only permit the recorded plats with 5 years before all zoning regulations apply. Thus, the valid, recorded subdivision plats must meet all current zoning regulations. It is respectfully submitted that Fairfax County should bear the burden of timely producing all of the regulations of the Zoning Ordinance. See *Williams*.

---

[9] §15.2-2261 C. ... , or in the case of a recorded plat for five years after approval, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development ...

[10] E. The provisions of this section shall be applicable to all recorded plats and final site plans valid on or after January 1, 1992.

Neither Va. Code §15.2-2266 nor Subdivision Ordinance Section 101-1-12 support Respondents' assertion. Those two regulations do not waive zoning approval. A development different than the recorded plat was created, and in 1978, the developed land was zoned according to its existing use of one house per two recorded plot lots. Despite this evidence, it was the adjacent homeowners' burden to disprove Fairfax County's unsupported assertions.

III. Petitioners Chose To Represent Themselves *Pro Se.*

By Order of the Circuit Court on July 16, 2006[11], petitioners were deemed *pro se* parties. In accordance with the order, petitioners proceeded to file their brief to the Circuit Court as *pro se* parties. As is clear from the cited portions of the Circuit Court transcript, counsel was appointed at the hearing.

IV. Substantive Due Process Was Denied When County Divided Consolidated Lots, Thereby Increasing Density In Their Restatement Of Petitioner's Appeal.

The Legal Notice was the first time Petitioners became aware that Fairfax County was reframing the appeal of the adjacent property owners. Despite sending a letter to the BZA indicating that the appealed issue should be "Appeal of a Zoning Administrator's determination that an existing conforming use can be redeveloped into a non-conforming use,"[12] the record that Respondents mention includes the Fairfax County staff report that based its report on the appeal

[11] Appendix F attached to the Petition for Writ of Certiorari.
[12] BZA Record at pages 289-336.

in the Legal Notice,[13] and the regurgitation of the Fairfax County staff report at the BZA hearing.[14]

Since the BZA heard from Fairfax County staff before hearing Petitioners, the single parcel of land upon which one house stood had already been divided into two by the assertion of Fairfax County staff. Thus, in the BZA's mind, before Petitioners argued their case, two parcels (or lots) of land were present. Under the County staff's reasoning, the division occurs at the time a house is torn down, regardless of zoning classification. Under the Subdivision Ordinance[15], a parcel of land cannot be divided without notice to adjacent property owners. Without any notice to property owners and before the appeal of the Zoning Administrator's determination, Fairfax County staff effectively rezoned our neighborhood to R-5 without due process under the 14th Amendment to the United States. Petitioners are requesting that all Zoning Ordinance provisions be followed.

---

[13] BZA Record at pages 110-219.

[14] BZA Record at pages 470-472.

[15] Section 101-2-1(B) of the Fairfax County Subdivision Ordinance.

Conclusion

For these reasons and the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Catherine M. Voorhees

and

David H. Voorhees

both of: 8029 Washington Road
Alexandria, VA 22308
703 765-7551

APPENDIX

Excerpt of § 1-400 of the Zoning Ordinance

PART 4 1-400 CONFLICTING ORDINANCES

Whenever any provision of this Ordinance imposes a greater requirement or a higher standard than is required in any State or Federal statute or other County ordinance or regulation, the provision of this Ordinance shall govern. Whenever any provision of any State or Federal statute or other County ordinance or regulation imposes a greater requirement or a higher standard than is required by this Ordinance, the provision of such State or Federal statute or other County ordinance or regulation shall govern. ...

Excerpts of §§ 2-306 and 401 of the Zoning Ordinance

2-306 Lot Size Requirements

1. In this Ordinance, lot size requirements are expressed in terms of:

A. Minimum district size.

B. Minimum lot area.

C. Minimum lot width.

2. In the R-C through R-4 Districts, minimum lot area and lot width requirements are presented for conventional subdivision lots, ...

3. Where no minimum district size is specified, the minimum lot area and lot width requirements shall define the minimum district size.

4. Where a minimum district size is specified for a given district, no parcel of lesser size shall be so classified in a given location in the County except by the Board acting on its own motion or except as may be permitted by the provisions of Sect. 9-610; provided, however:

...

B. If the district is an R district and if the same classification exists in a given location, additional lands may be rezoned to such classification if such lands are contiguous to the zoned district, and if such lands are in the same ownership, and if the rezoning of such lands would be in conformance with the adopted comprehensive plan. ...

2-401 Limitations on Subdivision of a Lot

1. Only a lot that exceeds the minimum provisions of this Ordinance may be subdivided to create more lots, and only then where the resultant lots shall themselves meet such minimum provisions, except for a minor adjustment of lot lines or consolidation of lots as may be permitted under Sect. 405 below. ...

Excerpt of § 9-610 of the Zoning Ordinance

Article 9 - Special Exceptions

9-610 Provisions for Waiving Minimum Lot Size Requirements

The Board may approve, either in conjunction with the approval of a rezoning or as a special exception, the waiving of the minimum district size and/or lot width requirement for an R District, except for all cluster subdivisions, the minimum lot area and/or lot width requirements ..., but only in accordance with the following:

1. Such lot has not been reduced in width or area since the effective date of this Ordinance to a width or area less than required by this Ordinance

.

2. The applicant shall demonstrate that the waiver results in a development that preserves existing vegetation, topography, historic resources and/or other environmental features; provides for reduced impervious surface; maintains or improves stormwater management systems; and/or similar demonstrable impact

.

3. It shall be demonstrated that development of the subject lot will not have any deleterious effect on the existing or planned development of adjacent properties or on area roadways.

4. Such waiver shall be approved only if the remaining provisions of this Ordinance can be satisfied.

Excerpt of §101-2-1 of the Subdivision Ordinance

Article 2. Subdivision Application Procedure and Approval Process

Section 101-2-1

Whenever any subdivision of land is proposed, the subdivider shall apply for and secure approval of such proposed subdivision in accordance with the following procedure.

...

(1)(B) Notice required.

(i) Any person who submits ... a construction plan when a preliminary subdivision plat is not required for approval under the provisions set forth in this Section shall submit written proof of notifications of all owners of property wholly or partially within 500 feet of the parcel to be subdivided and at least one homeowners' or civic association within the immediate area as approved by the Department of Public Works and Environmental Services. Such notice shall include notice to owners of properties wholly or partially within 500 feet which lie in an adjoining county or municipality. This notification must be to a minimum of 25 property owners other than the owner of the parcel to be subdivided. If there are fewer than 25 different owners of property wholly or partially within 500 feet of the subject property, then additional notices shall be sent to other property owners in the immediate vicinity so that notices are sent to different owners of not less than 25 properties.

(ii) Notice shall be sent to the last known address of the owner(s) as shown in the current Real Estate Assessment files and shall be sent by certified mail, return receipt requested. ...

(iii) All written notice required by this paragraph shall include the following information:

(1) the tax map reference number;

(2) the street address of the parcel;

(3) the ... construction plan ... name;

(4) the County identification number;

(5) the address and telephone number of the County Office where a copy of the ... construction plan ... may be reviewed or to where questions may be directed;

(6) a description of the proposed development including the number of units, area in acres, and density;

...

(9) a statement that the proposed construction may alter storm drainage from the site;

(10) the name, address and telephone number of a representative of the applicant; and

11) a reduction of the plan or plat showing the proposed development at a scale of 1 inch = 500 feet or larger on 8 1/2 inch by 11 inch sheet(s).

(iv) The notice shall state that:

...

(3) any person wishing to be notified of the approval of the ... construction plan ... should submit a written request to that effect to the County Office identified in the notice;

...